TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908

No. 187

NASHUA SAVINGS BANK, PETITIONER,

vs.

ANGLO-AMERICAN LAND MORTGAGE AND AGENCY COMPANY, LIMITED.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

FILED [illegible]

(18,268.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 167.

NASHUA SAVINGS BANK, PETITIONER,

vs.

ANGLO-AMERICAN LAND MORTGAGE AND AGENCY COMPANY, LIMITED.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

INDEX.

	Original.	Print.
Caption	a	1
Transcript from the circuit court of the United States for the district of New Hampshire	1	1
Writ of error to circuit court	1	1
Return of circuit court on writ of error	2	3
Court and title of case	3	3
Declaration	3	3
Defendant's plea and brief statement	7	6
Stipulation as to call of June 10, 1894	9	8
Payment under stipulation	11	9
Jury empaneled	11	9
Amendment to third count of declaration	11	9
Verdict	12	10
Defendant's bill of exceptions	13	10
Count of declaration upon which trial proceeded	13	10
Deposition of Frederick H. Ramsden	14	11
Statutes of Great Britain	17	14

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	Original.	Print
Memorandum of association	20	17
Certificate of incorporation	22	19
Amended articles of association	24	20
Certificate of stock	26	22
Deposition of Frederick H. Ramsden (cross)	27	23
Extracts from the register	28	24
Articles 14 to 20 of articles of association	29	25
Motion for verdict for defendant	30	26
Charge to jury and exceptions	31	27
Exceptions to charge	38	32
Defendant's requests to charge	41	34
Charge in full	41	34
Stipulation as to bill of exceptions	52	44
Judge's certificate to bill of exceptions	52	44
Agreement as to entering judgment	53	45
Judgment	53	45
Petition for writ of error and assignment of errors	54	46
Bond on writ of error	67	58
Certificate of clerk of circuit court	68	59
Citation and acknowledgment of service thereof	69	59
Opinion	71	60
Judgment	103	81
Certificate of clerk of circuit court of appeals	104	81
Writ of certiorari	105	82
Stipulation as to return to writ of certiorari	107	82
Return to writ of certiorari	108	83

a

EXHIBIT A.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1900.

No. 303.

Nashua Savings Bank,

DEFENDANT, PLAINTIFF IN ERROR,

v.

Anglo-American Land Mortgage and Agency Company, Limited,

PLAINTIFF, DEFENDANT IN ERROR.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW HAMPSHIRE, JUDGMENT IN CIRCUIT COURT, MARCH 16, 1899.

CERTIFIED COPY

OF

RECORD AND ALL PROCEEDINGS IN SAID CAUSE TO AND INCLUDING JUNE 14, 1901.

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1 United States Circuit Court of Appeals for the First Circuit, October Term, 1898.

NASHUA SAVINGS BANK, Defendant, Plaintiff in Error,
v.
ANGLO-AMERICAN LAND MORTGAGE AND AGENCY COMPANY, Limited, Plaintiff, Defendant in Error. } No. 303.

Writ of Error.

[L. S.] UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the district of New Hampshire, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between The Anglo-American Land Mortgage and Agency Company, Limited, a corporation organized and existing under the laws of the United Kingdom of Great Britain and Ire-

land, and having its principal office and situs in the city of London, in said kingdom, and a citizen of Great Britain, and an alien, and Nashua Savings Bank, a corporation organized under the laws of the State of New Hampshire, and having its situs at Nashua in said State and district, and a citizen of said State and district, a manifest error hath happened, to the great damage of the said Nashua Savings Bank, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the first circuit, together with this writ, so that you have the same in the city of Boston, Massachusetts, on the twenty-seventh day of July next, in the said circuit court of appeals; that the record and proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of
2 the Supreme Court of the United States, the twenty-eighth day of June, in the year of our Lord one thousand eight hundred and ninety-nine.

FREMONT E. SHURTLEFF,
Clerk of the Circuit Court of the United States, District of New Hampshire.

Allowed to operate as a supersedeas by consent.

W. L. PUTNAM,
Circuit Judge.

July 11, 1899.

CONCORD, N. H., *July* 8, 1899.

DEAR SIR: In the matter of The Anglo-American Land Mortgage & Agency Company (Limited) *v.* Nashua Savings Bank, in which judgment has lately been rendered for the plaintiff, the United States marshal for the district of New Hampshire, having in his possession eight thousand dollars of United States bonds to secure said judgment, the plaintiff waives the giving by the defendant of a supersedeas bond to secure the judgment and assents to the giving of the cost bond only, as approved by you on the twenty-eighth day of June, 1899, in taking the case to the circuit court of appeals on writ of error, and to the approving of the citation to operate as a supersedeas.

WILLIAM TUTHERLY,
Counsel for Anglo-American Land Mortgage & Agency Co.

Hon. William L. Putnam, United States circuit judge, Portland, Me.

Return of Circuit Court on Writ of Error.

CIRCUIT COURT OF THE UNITED STATES, } ss:
District of New Hampshire, }

And now, here, the judges of the circuit court of the United States, in and for the district of New Hampshire, make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the United States circuit court of appeals for the first circuit, as within commanded.

In testimony whereof, I, Fremont E. Shurtleff, clerk of said circuit court of the United States, in and for the district of New Hampshire, have hereto set my hand and the seal of said court this twenty-sixth day of July, A. D. 1899.

[SEAL.] FREMONT E. SHURTLEFF, *Clerk.*

3 *Transcript of Record of Circuit Court.*

(Filed in circuit court of appeals July 27, 1899.)

CIRCUIT COURT OF THE UNITED STATES, } ss:
District of New Hampshire, }

At a circuit court of the United States for the first circuit begun and holden at Concord within and for the district of New Hampshire on the eighth day of October, in the year of our Lord one thousand eight hundred and ninety-eight.

Present: Honorable William L. Putnam, circuit judge; Honorable Edgar Aldrich, district judge.

ANGLO-AMERICAN LAND MORTGAGE AND Agency Company (Limited) *v.* NASHUA SAVINGS BANK. } No. 420, Law Docket.

The Anglo-American Land Mortgage and Agency Company (Limited), a corporation organized and existing under the laws of the United Kingdom of Great Britain and Ireland and having its principal office and situs in the city of London, in said kingdom, and a citizen of Great Britian, and an alien, against the Nashua Savings Bank, a corporation organized under the laws of the State of New Hampshire, and having its situs at Nashua in said State and district, and a citizen of said State and district.

Declaration.

(Filed May 20, 1896.)

First count. In a plea of the case for that the said defendant heretofore, to wit, on the first day of September, A. D. 1894, at said London, to wit, at Nashua in the State of New Hampshire in the United

States of America, was indebted to the said plaintiff in a large sum of money to wit, seven thousand dollars for a certain call and
4 assessment made by said company in pursuance of its charter and by-laws, at said London, to wit, on the 10th of July, A. D. 1894, and to be paid on the first day of September, 1894, upon the defendant's subscription to a large number, to wit, one thousand shares at ten pounds sterling each, to wit, fifty dollars each of the capital stock of said company, which subscription had heretofore been made and subscribed in due form by said defendant, to wit, at said Nashua, and of the said assessment and call the said defendant had notice at Nashua, in the State of New Hampshire, heretofore to wit, on the the eleventh day of July, A. D. 1894, and thereafter to wit, on the first day of September, A. D. 1894, at said Nashua in consideration thereof the defendant then and there promised the plaintiff to pay the said sums on demand with interest at the rate of seven per cent. per annum from the time the same became due and payable as aforesaid.

Yet, though often requested, the defendant has never paid the said several sums of money or any of them, but has neglected and refused so to do.

Second count. And, also, in a further plea of the case for that the plaintiff avers that it is a corporation duly organized and existing under the laws of the United Kingdom of Great Britian and Ireland, and having its principal office and situs at the city of London in said kingdom, and is a citizen of said London; that by the provisions of the articles of association and incorporation of said company and the rules and regulations of said corporation that were in force at and before the time the said defendant became the subscriber to and owner of the shares of the capital stock of said corporation as hereinafter set forth, the said corporation was authorized and empowered to make calls upon its shareholders from time to time in respect to all moneys unpaid on their respective shares, and each shareholder would be liable to pay the amount of calls so made as to the persons and at the times and places appointed by the said corporation, and that shareholders should be liable to pay interest at seven per centum per annum from the day appointed for payment of such call to the time of the actual payment of the calls in arrears.

And the plaintiff further avers that James Lewis Lombard, heretofore, to wit, on the thirtieth day of August, A. D. 1883, was
5 the owner of one thousand shares of ten pounds each, English or sterling money, par value of the capital stock of the said corporation, which shares had theretofore been subscribed for and purchased by him, the said Lombard, and the same had been legally transferred to him and his heirs and assigns, and accepted and held by him, the said Lombard, for himself, his heirs and assigns, subject to the articles of association and the rules and regulations of said corporation as aforesaid; that upon said one thousand shares two pounds each of English money had been paid and eight pounds each remained unpaid.

That on said thirtieth day of August, A. D. 1883, by an assign-

ment in writing in due form of law, the said James Lewis Lombard sold, assigned, transferred and delivered to the defendant his said one thousand shares of the capital stock of the plaintiff corporation, and the said shares were then and there accepted by it, the said defendant, subject to the articles of association and rules and regulations of the plaintiff corporation, and said assignment was afterwards, to wit, on the day last aforesaid, at the request of the said defendant, accepted by said plaintiff and duly registered on the books of said corporation, of which the defendant then and there had knowledge, and the said defendant, ever since said assignment and registration last aforesaid, has been the registered and legal holder of said one thousand shares; and in consideration thereof, then and there, to wit, at said Bristol, promised to pay said plaintiff all such calls upon said shares as the said plaintiff might make from time to time, if not exceeding one pound English or sterling money upon each share at any one time, to the person and at the times appointed by the said corporation, with interest at the rate of seven per cent. per annum from the day appointed for the payment of such call to the time of the actual payment of the calls in arrears.

And the plaintiff further avers that on the tenth day of July, A. D. 1894, the said corporation agreeably to its articles of association and rule- and regulations aforesaid, made a call upon its shareholders, including the defendant, which was then and there the legal owner and holder of all the aforesaid one thousand shares, of one pound sterling or English money per share, payable on the first day
6 of September, A. D. 1894, at the said company's office in said London, of which said call the said defendant had notice at said Nashua afterwards, to wit, on the same tenth day of July, A. D. 1894.

Yet the said defendant, though often requested, has not paid the amount of the said call upon its said shares as aforesaid or any part thereof.

Third count. And also in a further plea of the case for that the said defendant heretofore, to wit, on the second day of December, A. D. 1895, at said London, to wit, at Nashua in the State of New Hampshire in the United States of America, was further indebted to the said plaintiff in a large sum of money, to wit, eight thousand dollars for a certain call and assessment made by said company in pursuance of its charter and by-laws, at said London, to wit, on the tenth day of July, A. D. 1895, and to be paid on the second day of December, A. D. 1895, upon the defendant's subscription to a large number, to wit, one thousand shares at ten pounds sterling each, to wit, fifty dollars each of the capital stock of said company, which subscription had theretofore been made and subscribed in due form by said defendant, to wit, at Nashua, and of the said assessment and call the said defendant had notice at Nashua in the State of New Hampshire, heretofore, to wit, on the second day of December, A. D. 1895, and thereafter, to wit, at said Nashua, on the second day of December, A. D. 1895, in consideration thereof, the defendant then and there promised the plaintiff to pay said sums on demand with interest at the rate of seven per cent. per annum from the time the

same became due and payable as aforesaid. Yet though often requested, the defendant has never paid said several sums of money, or any of them, but has neglected and refused so to do, to the damage of the said plaintiff (as it says) the sum of fourteen thousand dollars.

This cause, returnable at the August term, A. D. 1896, of this court, was for the purposes of pleading under rule 12 of this court, docketed on the twentieth day of May, A. D. 1896, and an order on the defendant to plead within one calendar month was entered on said twentieth day of May, and thereafter, to wit, on the eighteenth day of June, A. D, 1896, the defendant filed the following plea and brief statement:—

7 *Defendant's Plea and Brief Statement.*

(Filed June 18, 1896.)

And now the defendant comes, etc., when, etc., and says it never promised the plaintiff in the manner and form it has declared against it, and for this puts itself upon the country.

By its attorneys, J. H. S. FRINK.
C. J. HAMBLETT.

The plaintiff will take notice that the defendant makes the following brief statement of its defence:

(1.) It denies the said plaintiff corporation was ever duly organized, or that all the shares necessary to enable said corporation to duly and legally organize have even been subscribed for or taken.

(2.) It denies that James Lewis Lombard was ever the *bona fide* owner and holder of the stock it is alleged in plaintiff's declaration was sold, assigned, transferred and delivered to said defendant, or that defendant ever accepted the assignment of the same.

(3.) It says that said James Lewis Lombard conspired with the plaintiff company to make sale to said defendant of said shares, through false and fraudulent representations, and that the sale and acceptance to said defendant in plaintiff's declaration alleged was procured by the fraudulent and false representations of said James Lewis Lombard, acting for and in behalf of the plaintiff company.

(4.) It says that said James Lewis Lombard, conspiring with the plaintiff company, and with full knowledge on the part of the plaintiff, sold said stock to the said defendants upon the false and fraudulent representation and promise, that there never should be a call for more than two pounds sterling per share on the subscription to said stock, and the call and assessment in the suit is in excess of said sum.

(5.) It says that said James Lewis Lombard, with the full knowledge and authority on the part of the plaintiff to make the representations hereinafter recited, in order to induce said defendant to purchase said shares, represented to it that the capital stock
8 of said company was placed at ten pounds sterling per share, because it was the English method of doing business, and

that it was necessary to do so to comply with the English law or custom in such cases, in order to absorb the surplus, which he represented would accumulate from the profits of the business of said corporation, and to enable the company to increase its capital stock if desirable, by making dividends from its surplus, and that said representations were false and fraudulent, and the said defendant in making said purchase relied upon the same.

(6.) It says that defendant was induced to purchase said stock, relying upon the promise of said James Lewis Lombard, with the full knowledge and assent of the plaintiff company, that the American stockholders should be represented in the board of officers of said company and have a voice in the management of its affairs, but the plaintiff corporation has refused and neglected to choose any such officers, and did not so intend at the time of such representations, with a view of making the fraudulent call and assessment in plaintiff's declaration alleged.

(7.) It says that the plaintiff corporation has purposely and with a view to making unlawful assessments and calls, intentionally debarred the American stockholders from attending any meeting of said company, by neglecting to give the American subscribers to stock in said company, including the defendant, seasonable notice of the meetings of said company, at which said alleged assessments were voted, so that it would be possible for them to attend said meetings, and they did not attend said meetings, for want of such seasonable notice, and the defendant will claim that the assessments are invalid, for this and other causes.

(8.) It says the assessment declared upon us was not a legal assessment against the stockholders in said company, because no notice to the stockholders was ever given of a meeting to consider the subject of making an assessment upon said stock, so as to render it possible for the stockholders to be present or to be represented at such meeting.

(9.) It says the assessments attempted to be collected in this suit are invalid, unlawful and unauthorized.

(10.) It says that no assessment whatever was made, or is
9 alleged to have been made, upon the stock alleged to have been sold, assigned, transferred and delivered to the defendant by said James Lewis Lombard, since said alleged sale, assignment, transference and delivery.

(11.) It says that defendant never subscribed for any of the stock of said plaintiff corporation, nor was it at the time of said alleged assessment nor has it ever been the owner of any such stock.

And at the August term, A. D. 1896, the parties appeared by their respective attorneys, and thence the action was continued from term to term to the October term, A. D. 1897, of this court, when, to wit, on the nineteenth day of October, A. D. 1897, a jury of twelve men, duly qualified, was empanelled and sworn to try the issues between the parties according to the law and the evidence submitted, and thereafter, to wit, on the twentieth day of October, A. D. 1897, by agreement of counsel the case was withdrawn from the jury, and the following stipulation filed:

Stipulation.

(Filed October 20, 1897.)

The following agreement is hereby made in the above-entitled action:

The defendant to pay the call of July 10, 1894, in the sum of $5,914.71, within ten days, the taxable costs in the above suit, the same to be taxed by the clerk and the suit to be continued as to balance of the action upon the call of £1 5s. of Oct. 4, 1895.

It is further agreed that the plaintiff by its officers or some authorized agent or agents and attorney will meet a committee representing the American shareholders in the plaintiff company and undertake to determine the value of the assets of said company for the purpose of ascertaining how much money, in addition to the amount the company has on hand, will be required with such assets, the value of which is undertaken to be determined as aforesaid, to meet the liabilities of said corporation or company, and in case it shall be ascertained upon such valuation that additional funds are needed over and above said payment, to meet the liabilities of said company, this defendant will contribute such further amount upon suit now pending as shall be required to meet its equitable share, upon the payment of which this suit shall be dismissed, and defendant's stock at its option shall be surrendered, cancelled or forfeited in such manner as the directors of the company may find necessary, and if so surrendered, cancelled or forfeited, then the defendant shall be relieved of all further calls or assessments on the part of said company; but if it does not choose to surrender, cancel or forfeit its stock, but shall retain the same, then it shall assume and promise to meet all the obligations and duties of a shareholder in said company and shall enjoy all the benefits of a shareholder.

If the parties hereto shall not come to an agreement upon effort to compromise the further liability of the defendant, this action shall be subject to trial for the call of £1 5s., made on Oct. 4, 1895, without prejudice by reason of this agreement, neither shall the defendant's liability for further calls be in any way prejudiced thereby.

It is expressly understood by the parties hereto that this stipulation is entered into on the part of the plaintiff, by the attorneys of the plaintiff, without any authority to bind the plaintiff to compromise the defendant's further liability as a shareholder in plaintiff company, but on the part of the plaintiff's attorneys it is agreed that this agreement is entered into on their part in good faith and with the opinion that the plaintiff company will accept the same, and the plaintiff's attorneys further agree that they will recommend this settlement in the manner as herein stated, and have no reason to doubt the willingness of the plaintiff to so settle, and said attorneys will use their best efforts to have the plaintiff carry out this agreement.

It is further agreed on the part of the plaintiff that this agreement shall bind the plaintiff absolutely to the extent of the payment

made and the adjournment of the action pending the effort to make a compromise, and that the payment made, the making of this stipulation, and the effort to carry out the same shall not in any way prejudice the rights of the defendant as to any defence he may urge to the payment of any call made after June 10, 1894.

11 In witness whereof, we have set our hands to this agreement in triplicate at Concord, N. H., on this twentieth day of October, A. D. 1897.

NASHUA SAV. BANK,
By its attorneys, J. S. H. FRINK,
A. T. BATCHELDER,
HIRAM BLAKE,
C. J. HAMBLETT.
THE ANGLO-AMERICAN LAND MORTGAGE & AGENCY CO.,
By GILBERT A. DAVIS, *Attorney.*
POWELL & DAMRON, *Attorneys.*

On the back of which said stipulation *is* the following endorsements:

Received of The Nashua Savings Bank, defendant, $6,059.58 in full of the call of July 10, 1894, and interest and costs of this action to this date in accordance to within contract.

Dated, Concord, N. H. Oct. 20/97.

POWELL & DAMRON,
Att'ys for Pl'ff.

This action was thence continued to the May term, A. D. 1898, of this court, when, on, to wit, the twenty-seventh day of June, A. D. 1898, a jury of twelve men, duly qualified, was empanelled and sworn to try the issues according to the law and the evidence. And on the twenty-eighth day of June, 1898, the plaintiff files the following amendment to the declaration:—

Amendment to Third Count of Declaration.

(Filed June 28, 1898.)

And now comes the said plaintiff and asks leave to amend the third count of the declaration in said cause by inserting in the eleventh line (the tenth line in this transcript) after the words "subscription to" the words "and ownership of."

By its attorney, GILBERT A. DAVIS.

12 Ordered by the court that the said amendment be allowed, and it is made this twenty-eighth day of June, A. D. 1898.

Attest: FREMONT E. SHURTLEFF, *Clerk.*

And thereafter, to wit, on the thirtieth day of June, A. D. 1898, on motion of the plaintiff, the court directed a verdict for the plaintiff, and thereupon, on said thirtieth day of June, the jury brought in the following verdict:—

Verdict.

June 30, 1898.

The jury find that the defendant did promise the plaintiff, in manner and form as alleged by the plaintiff, and assess the plaintiff's damages at six thousand eight hundred fifty-eight dollars and sixty-seven cents.

RUFUS E. TUTTLE, *Foreman.*

It was thereupon, on said thirtieth day of June, ordered by the court that the defendant file its bill of exceptions by the first day of August, A. D. 1898, and the plaintiff its corrections by the fifteenth day of August, 1898, exceptions to be allowed after adjournment of term with the same effect as before adjournment.

Thereafter, on, to wit, the twenty-fifth day of July, A. D. 1898, upon motion of the defendant the time for filing bill of exceptions was extended to the fourth day of August, A. D. 1898, and the time for filing corrections was extended to the nineteenth day of August, A. D. 1898. And thereafter on, to wit, the fourth day of August, A. D. 1898, the defendant filed its draft bill of exceptions and on the eighteenth day of August, A. D. 1898, the plaintiff filed its corrections thereto.

This cause was thence continued to the August term, A. D. 1898, when, to wit, on the fifth day of October, A. D. 1898, the defendant filed corrected bill of exceptions.

The cause was thence continued to the present term, when, to wit, on the twenty-ninth day of October, A. D. 1898, the court allowed the defendant's bill of exceptions, which bill of exceptions as allowed is as follows:

13 *Defendant's Bill of Exceptions.*

(Allowed October 29, 1898.)

This is an action of assumpsit originally brought in this court. The plaintiff is an alien and a citizen of England, and the defendant is a corporation established under the laws of New Hampshire, having its principal place of business in Nashua, in said State, and a citizen of said State.

The count in the declaration upon which the trial proceeded, as amended, is as follows:—

"In a plea of the case for that the said defendant heretofore, to wit, on the second day of December, A. D. 1895, at said London, to wit, at Nashua, in the State of New Hampshire, in the United States of America, was further indebted to the said plaintiff in a large sum of money, to wit, eight thousand dollars for a certain call and assessment made by said company in pursuance of its charter and by-laws, at said London, to wit, on the tenth day of July, A. D. 1895, and to be paid on the third day of December, A. D. 1895, upon the

defendant's subscription to and ownership of a large number, to wit, one thousand shares at ten pounds sterling each, to wit, fifty dollars each of the capital stock of said company, which subscription had theretofore been made and subscribed in due form by said defendant, to wit, at said Nashua, and of the said assessment and call the said defendant had notice at Nashua, in the State of New Hampshire, heretofore, to wit, on the second day of December, A. D. 1895, and thereafter, to wit, at said Nashua, on the second day of December, A. D. 1895, in consideration thereof, the defendant then and there promised the plaintiff to pay said sums on demand with interest at the rate of seven per cent. per annum from the time the same became due and payable as aforesaid. Yet though often requested the defendant has never paid said several sums of money, or any of them, but has neglected and refused so to do."

At the trial before the jury begun on the twenty-seventh day of June, A. D. 1898, the plaintiff introduced the following evidence: Counsel for plaintiff offered certain entries in the books of the plaintiff company, to which counsel for defendant objected, saying:

Mr. FRINK: "My objection is, they have not proved that we are a stockholder and either had implied or actual knowledge of the by-laws of the association."

14 The plaintiff then introduced the deposition of Mr. Frederick H. Ramsden, who was asked the following interrogatory:

"Int. 1. State your full name, residence, and occupation?

Ans. My full name is Frederick Herbert Ramsden; my age is twenty-six years and upwards; my business residence is No. 150 Leadenhall street in the city of London, England; I am a duly qualified solicitor of the supreme court of judicature in England (equivalent to attorney-at-law of the United States) practicing in the city of London, and as such solicitor I am thoroughly acquainted with the law of England. I am also secretary of the plaintiff company."

"Int. 42. State, if you know, what notice of such calls or assessments was given to said Nashua savings bank, and by what authority was such notice given, if any?"

His answer to that question was received without objection and is as follows:

"Ans. I was not secretary of the plaintiff company until shortly after the 1894 call was made. At that time Mr. J. F. Bennett was secretary of the company. The defendant Nashua Savings Bank's registered address is as shown by *Exhibit 7 hereto*, and they have never named a place of address within the United Kingdom as required by clause 139 of the articles of association (Exhibit 6 hereto), and notice as required by said articles of association of the 1895 call addressed to them by and in accordance with the clause 140 of the said Exhibit 6 hereto was, therefore, to my personal knowledge duly posted up and remained posted up in a conspicuous place in the registered office of the company for more than a month before the call was payable. In addition to the above, however, a printed notice of call was also forwarded to the defendant Nashua Savings

Bank and all other shareholders of the company who had likewise failed to give an address in accordance with clause 139 aforesaid, by a prepaid letter through the post directed to their registered address, which is in the United States. I have searched for but am unable now to find the original notice which was so posted up, but it was to the effect and in the words and figures of the writing which I now produce and hand to the commissioner to be annexed hereto as Exhibit 25. Similar notice of the 1894 call to the defendant Nashua Savings Bank and others which had been posted up under the articles of association by the former secretary continued, to my personal knowledge, to be posted up in a conspicuous place in the registered office of the company from the time I became secretary until after 1st September, 1894. I have searched for, but am unable now to find the original of such notice to the defendant Nashua Savings Bank, but it was to the effect and in the words and figures of the writing which I now produce and hand to the commissioner to be annexed hereto and marked 'Exhibit No. 26.'"

15 The next question in the said deposition was as follows:

"Int. 45, State whether or not the amount of said calls or assessments, if any, has ever been paid to the plaintiff company by said Nashua savings bank, or by any one in its behalf, or by any previous owner of such shares?"

Mr. FRINK. "We object to the answer, as it does not appear to be of his own personal knowledge. He is not the treasurer."

The COURT. "It does not appear it was not. Was objection made to the question?"

Mr. POWELL. "No."

The COURT. "That will have to be read then. I shall have to submit it to the jury, and they will determine whether he has answered from his own knowledge. Of course I will instruct the jury, if it becomes necessary, that they cannot regard it, unless they are satisfied, from all the facts in the case, it is within his own knowledge. I will also say that I look upon this as entirely a matter of defence—whether the assessments have been paid or not."

Mr. FRINK. "We except to the admission of this answer, because it does not appear that the deponent has any personal knowledge as to whether the assessments were paid or not, and because it does not appear that he occupied any official position from which he could have derived knowledge."

The COURT. "The exception is saved."

"Ans. The amount paid on the 1,000 shares standing in the name of the Nashua savings bank is £2 per share. James L. Lombard paid the first 1£ per share on the said shares before they were transferred by him to the defendant Nashua Savings Bank. In 1885 a call of a further £1 per share was made payable by two instalments on the 1st of October and 1st December, 1885, and the Nashua savings bank paid the company on the 28th of September, 1885, £500, and on the 4th December, 1885, £500, in respect of the said instalments of the said call on the said 1,000 shares held by them. No other payment in respect of calls on the said shares has been made

by the said Nashua savings bank or by any one on its behalf or by any previous owner of the said shares."

The plaintiff offered in evidence the statutes of England, which they claimed were authenticated by the deposition of Mr. Ramsden, and the defendant objected to the introduction of said statutes on the ground of defective authentication of the laws of a foreign state. The testimony of Mr. Ramsden as to his qualifications bearing upon this subject is as follows:

"Int. 1. State your full name, age, residence and occupation.

Ans. My full name is Hildebrand Ramsden; my age is sixty years and upwards, and I reside at 26 Upper Bedford place, Lon-
16 don, England. In 1862 I was admitted as attorney-at-law of Her Majesty's courts of Queen's Bench, common pleas and exchequer, and solicitor of the high court of chancery in England, such attorneys and solicitors being since the judicature act, 1873, designated solicitors of Her Majesty's supreme court of judicature in England. I am practicing and have practiced as such attorney and solicitor for the last thirty years and upwards, at 150 Leadenhall street, in the city of London. I have a large practice in and am intimately acquainted with English company or corporation law. I graduated as a master of arts of the University of Cambridge in England, before I was admitted as attorney and solicitor. I am also a commissioner of oaths. I am also managing director for the plaintiff company."

"Int. 5. What kind of an association or body is the plaintiff, The Anglo-American Land Mortgage and Agency Company, Limited, when was it organized and under what laws, and what number of shares had been subscribed at the date of its organization?

Ans. The plaintiff company, The Anglo-American Land Mortgage and Agency Company, Limited, is a corporation formed with limited liability under the companies' acts, 1862–1880. These acts are (as appears by 43 Vict. cap. 19, sect. 2) 25 and 26 Vict. cap. 89— 'An act for the incorporation, regulation and winding up of trading companies and other associations,' and the following amending acts, viz.: 30 and 31 Vict. cap. 131, 'An act to amend the companies' acts, 1862;' 40 and 41 Vict. cap, 26, 'An act to amend the companies' act, 1862 and 1867;' 42 and 43 Vict. cap. 76, 'An act to amend the law with respect to the liability of members of banking and other joint stock companies and for other purposes;' 43 Vict. cap. 19, 'An act to amend the companies' act, 1862, 1867, 1877 and 1879.' I produce copies of these five acts and hand same to the commissioner to be annexed hereto as Exhibits 57, 58, 59, 60 and 61. These copies are issued by authority, being printed by Her Majesty's printer and are as such by law receivable in evidence without further proof.

The COURT: What is your purpose in offering this proof of the statutes of Great Britain?

Mr. POWELL: The purpose of offering the proof is to show that we have a right of incorporation and are incorporated, and the other reason is, that the foreign statutes prescribe the liability and the rights of stockholders.

The COURT: The plaintiff offers to prove, as I understand, the existence of the corporation, and the first step is an offer of the statutes of Great Britain by virtue of which he says this plaintiff corporation was organized. Under the general rules of law as commonly understood, a statute of Great Britain can be proved only under the great seal—or by copy under the great seal—or by copy
sworn to have been compared with the enrolled statute, or by a
17 sworn certificate by some officer duly authorized to give copies.
The plaintiff has neither of these here. But he has the deposition of Mr. Ramsden, who swears he is a solicitor of the supreme court of judicature of England, and he has produced what he says are copies of certain statutes of Great Britain, which are attached to his depositions as copies and marked exhibits. Now the case of *Hall v. Costello*, 48 N. H. 176, has relaxed that strict rule, as to the method of proving the statutes of foreign countries, and permitted them to be proven by a copy, not duly authenticated, in connection with the testimony of an attorney-at-law in the State of New Hampshire, who testified he had made himself familiar with the laws of Canada. I think, under that decision, I must finally leave it to the jury to determine whether Ramsden was sufficiently qualified, as a matter of fact, to understand what the written laws of Great Britain were. That is a question of fact, which I can dispose of only in this preliminary way. It will be for the jury to finally determine whether they find anything in the record to satisfy them that Mr. Ramsden is sufficiently familiar with the laws of Great Britain, or was of sufficient experience to satisfy them that what he has produced here are the laws of Great Britain. Therefore, without ruling upon the question, whether or not, under the laws of New Hampshire, the defendant can raise a question of the existence of this corporation under the pleadings as they stand, for the purpose of enabling the plaintiff to prove, as a fact, the existence of a corporation, and the other purpose stated by the plaintiff, I allow him to introduce these statutes."

To the above ruling of the court, admitting the statutes of Great Britain, the defendant duly and seasonably excepted, on the ground that the statutes of Great Britain offered are not proved according to the established rules of law, and because they are not proved or authenticated under the great seal of Great Britain, or by a person under oath who has compared them, or by a certificate of an officer who has been authorized to make such a certificate.

Thereupon the plaintiff, subject to the exception of the defendant, introduced the following statutes of Great Britain:

25 and 26 Victoriæ, cap. 89.

"An act for the incorporotion, regulation and winding up of trading companies and other associations.

6. Any seven or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of this act in respect of registration, form an incorporated company with or without limited liability.

7. The liability of the members of a company formed under this act may, according to the memorandum of association, be
18 limited either to the amount, if any, unpaid on the shares respectively held by them, or to such amount as the members may respectively undertake by the memorandum of association to contribute to the assets of the company in the event of its being wound up.

8. Where a company is formed on the principle of having the liability of its members limited to the amount unpaid on their shares, hereinafter referred to as a company limited by shares, the memorandum of association shall contain the following things; (that is to say,)

(1.) The name of the proposed company with the addition of the word 'Limited' as the last word in such name:

(2.) The part of the United Kingdom, whether England, Scotland or Ireland, in which the registered office of the company is proposed to be situate:

(3.) The objects for which the proposed company is to be established:

(4.) A declaration that the liability of the members is limited.

(5.) The amount of the capital with which the company proposes to be registered divided into shares of a certain fixed amount subject to the following regulations:

(1.) That no subscriber shall take less than one share.

(2.) That each subscriber of the memorandum of association shall write opposite to his name the number of shares he takes.

12. Any company limited by shares may so far modify the conditions contained in its memorandum of association, if authorized to do so by its regulations as originally framed, or as altered by special resolution in manner hereinafter mentioned, as to increase its capital, by the issue of new shares of such amount as it thinks expedient, or to consolidate and divide its capital into shares of larger amount than its existing shares, or to convert its paid-up shares into stock, but, save as aforesaid, and save as is hereinafter provided in the case of a change of name, no alteration shall be made by any company in the conditions contained in its memorandum of association.

16. The articles of association shall be printed, they shall bear the same stamp as if they were contained in a deed, and shall be signed by each subscriber in the presence of, and be attested by one witness at least, and such attestation shall be a sufficient attestation in Scotland, as well as in England and Ireland. When registered they shall bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in such articles contained a covenant on the part of himself, his heirs, executors and administrators to conform to all the regulations contained in such articles, subject to the provisions of this act; and all monies payable by any member to the company, in pursuance of the conditions and regulations, shall be deemed to be a debt due from such member to the company, and in England and Ireland to be in the nature of a specialty debt.

50. Subject to the provisions of this act, and to the conditions contained in the memorandum of association, any company formed under this act may, in general meeting from time to time by passing a special resolution in manner hereinafter mentioned, alter all or any of the regulations of the company contained in the articles of association or in the table marked 'A' in the first schedule where such table is applicable to the company, or make new regulations to the exclusion of or in addition to all or any of the regulations of the company; and any regulations so made by special resolution shall be deemed to be regulations of the company of the same validity as if they had been originally contained in the articles of association, and shall be subject in like manner to be altered or modified by any subsequent special resolution.

51. A resolution passed by a company under this act shall be deemed to be special whenever a resolution has been passed by a majority of not less than three-fourths of such members of the company for the time being entitled, according to the regulations of the company, to vote as may be present, in person or by proxy (in cases where by the regulations of the company proxies are allowed), at any general meeting of which notice specifying the intention to propose such resolution has been duly given, and such resolution has been confirmed by a majority of such members for the time being entitled, according to the regulations of the company, to vote as may be present, in person or by proxy, at a subsequent general meeting of which notice has been duly given, and held at an interval of not less than fourteen days nor more than one month from the date of the meeting at which such resolution was first passed: at any meeting mentioned in this section, unless a poll is demanded by at least five members, a declaration of the chairman that the resolution has been carried shall be deemed conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favor of or against the same. Notice of any meeting shall, for the purposes of this section, be deemed to be duly given and the meeting to be duly held, whenever such notice is given and meeting held in manner prescribed by the regulations of the company. In computing the majority under this section, when a poll is demanded, reference shall be had to the number of votes to which each member is entitled by the regulations of the company.

67. Every company under this act shall cause minutes of all resolutions and proceedings of general meetings of the company, and of the directors or managers of the company in cases where there are directors or managers to be duly entered in books to be from time to time provided for the purpose, and any such minute as aforesaid, if purporting to be signed by the chairman of the meeting at which such resolutions were passed or proceedings had, or by the chairman of the next succeeding meeting shall be received as evidence in all legal proceedings; and until the contrary is proved, every general meeting of the company or meeting of the directors or managers in respect of the proceedings of which minutes have been so made, shall be deemed to be duly held and convened

and all resolutions passed thereat or proceedings had, to have been duly passed and had, and all appointments of directors, managers or liquidators shall be deemed to be valid, and all acts done by such directors, managers or liquidators shall be valid, notwithstanding any defect that may afterwards be discovered in their appointments or qualifications."

Also memorandum of association as follows, was read in evidence:

"The companies acts 1862 to 1880.

Company limited by shares.

Memorandum of Association of the Anglo-American Land Mortgage and Agency Company, Limited.

First. The name of the company is "The Anglo-American Land Mortgage and Agency Company, Limited."

Second. The registered office of the company is to be situated in England.

Third. The objects for which the company is established are:

(*a.*) The investment or advancement of money on loan on the security by first mortgage of or first charges or liens on lands, hereditaments, and real or heritable estate of all and any description and tenures, situated in the United States of America or Canada, either with or without collateral or other security, and either by original loan or by the acquisition of or advances upon existing first-mortgage charges or liens.

(*b.*) The selling and disposition of the mortgages and securities above mentioned, either with or without the guarantee of the company for the payment of the principal or interest thereof, or any part thereof.

(*c.*) The receiving of money on deposit, and the borrowing of money for the purposes of such investment and the issuing to the lenders of such money, of bonds, debentures, debenture stock certificates, deposit notes or receipts, or other securities of the company, either based upon all or any of the mortgages or securities of the company or otherwise, and transferable or otherwise: the mortgaging, allocating, setting apart, or depositing any of the said mortgages or securities of the company either with or without constituting a special trust of the same for the purposes of such borrowing: and the redemption and repurchase of such bonds, debentures and securities.

(*d.*) The exercise of all the powers of mortgages, including
21 the power of acquiring the absolute ownership or power of disposition over the mortgaged premises, and the improvement thereof for purposes of sale, mortgage or other disposition.

(*e.*) The effecting for its own account, or for that of other parties, all operations of exchange.

(*f.*) The acting as agents, or otherwise, for the negotiations and carrying into effect of sales of land and the American and Canadian securities, on commission or otherwise.

(*g.*) The acting as agents, or otherwise, for the investment, pay-

ment, transfer or collection of money, coupons or other pecuniary interests.

(*h.*) The undertaking, either alone or in conjunction with other parties, loans to any State, county, municipality, railway company, or other public or private association; the tendering for such loans for account of othes parties and the negotiation of bonds and loans upon commission.

(*i.*) The making and carrying out any arrangement for uniting or amalgamating, either in whole or in part, the business of the company with that of any other company, corporation, firm or individual engaged in carrying on any business of a nature similar to that or any of those of the company, and for purchasing any such business.

(*j.*) The establishing and regulating agencies for carrying out the objects hereinbefore mentioned.

(*k.*) The making, accepting or indorsement of promissory notes, bills of exchange and other negotiable instruments.

(*l.*) The doing of such other things, both at home and abroad, including the obtaining of any corporate, executive or administrative power, as may be incidental to or expedient for the carrying out of the objects hereinbefore mentioned, or any of them; and also such additional or extended objects as the company may from time to time by special resolution determine and resolve.

Fourth. The liability of the members is limited.

Fifth. The nominal capital of the company is £500,000 divided into 50,000 shares of £10 each, of which the first issue shall be 25,000 shares, with power to increase such capital, and to issue all or any part of the original or increased capital at a premium or at a discount, and with such preference, priority or privilege as may be thought desirable.

We the several persons whose names, addresses and descriptions are subscribed are desirous of being formed into a company in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite to our respective names:

22 *Names, Addresses, and Descriptions of Subscribers.*

	Number of shares taken by each subscriber.
Charles Fraser Mackintosh, M. P., 5 Clages street, London, W ..	One
David MacPherson, merchant, Cowper's court, 32 Cornhill, London, E. C	One
William Henry Richards, merchant, 36 Mark lane, E. C	One
James George Button Browning, gentleman, 51 Brook street, Grosvenor square.....	One
Hunter Stephenson, merchant, 26 Suffolk street, Pall Mall.....	One
Eben Walker Henry, insurance broker, Penn-garth, Croydon...	One
James Frederick Bennett, secretary to Public Co., 90 Charlotte street, London.....	One

Dated the twenty-fifth day of October, 1882.

Witness to the above signatures,

EDMUND S. PARKER,
Solicitor's Clerk, 75 Cornhill, London, E. C.

No. 17465. C. N. L. 16,900.

Certificate of Incorporation of the Anglo-American Land Mortgage and Agency Company, Limited.

I hereby certify that the Anglo-American Land Mortgage and Agency Company, Limited, is this day incorporated under the companies' acts, 1862 to 1880, and that this company is limited.

Given under my hand, at London, this twenty-first day of October, one thousand eight hundred and eighty-two.

W. H. COUSINS,
Registrar of Joint Stock Companies.

Fee, £48:15:0.

Also articles of association of the alleged plaintiff corporation as follows, were read:

1. The regulations contained in the table marked "A" in the first schedule to the companies' act, 1862, shall not apply to this company, which shall be governed by the following regulations.

2. The offices of the company shall be at No. 1 Queen Victoria street, in the city of London, or at such other place in London, or Middlesex, as the directors may from time to time appoint, and with branch offices or agencies also, as the directors may from time to time appoint.

23 3. Every person who has accepted any share or shares in this company, and whose name is entered in the register of members, and no other person, shall be deemed to be a member.

14. The deed of transfer shall be in the usual common form, and be presented to the company accompanied with such evidence as the directors may require to prove the title of the transferror, and thereupon the company shall register the transferee as a member.

9. Every member shall be entitled to a certificate under the common seal of the company, specifying the share or shares held by him and the amount paid up thereon, and if such certificate be worn, damaged or lost, it may be renewed, if the board think fit, on the payment of 1s.

73. The business of the company shall be managed by the directors, subject to the control of the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if such regulation had not been made.

74. The directors may commence and prosecute the business and objects of the company, notwithstanding that the whole of the shares have not been issued or taken up.

81. The directors shall be invested with general authority to exercise all such powers of the company as are not by the companies' acts 1862 to 1880 or by the regulations in these articles contained, declared to be exercisable only by the company in general meeting.

88. The directors shall cause minutes to be made in books provided for the purpose:

1. Of all appointments of officers made by the directors.

2. Of the names of the directors present at each meeting of directors and committees of directors.

3. Of all orders made by the directors and committees of directors, and

4. Of all resolutions and proceedings of meetings of the company and of the directors and committees of directors.

And any such minute as aforesaid, if signed by any person purporting to be the chairman of any meeting of the company, or of the directors or committee of directors, shall be receivable in evidence, without any further proof.

107. The secretary shall, under the direction of the board, have charge of the books and accounts of the company, conduct the correspondence on its behalf, and perform such other duties as may from time to time be required by the directors, or be incidental to the office of secretary.

118. The board may, if they deem it desirable in the interest of the company, and for the more convenient conduct of its operations, appoint one of their number to specially superintend the business of the company, either as chairman or managing director, and either for a fixed term or without limitation as to the period for
24 which he is to hold such office, and at such remuneration (in addition to his ordinary remuneration as director of the company) as they see fit, and may from time to time remove him from such office, and appoint another in his place.

138. All members resident out of the United Kingdom shall be required to name a place of address in the United Kingdom at which the notices of the company may be served; and the service of any notice of the company at such place of address shall be sufficient notice to such member.

139. If any member resident out of the United Kingdom neglect to give such address as is hereinbefore required, notices for him may be posted up in a conspicuous place in the registered office of the company, and for all the purposes of these regulations the registered office of the company shall be deemed to be the registered place of abode of such member.

140. Any notice requiring authentication by the company may be signed by the director, secretary or other officer of the company in that behalf authorized by the directors, and need not be under the common seal of the company.

141. Notice by letter shall be posted in such time as to admit of the letter being delivered in the due course of delivery within the period (if any) prescribed for the giving of such notice and in proving such service, it shall be sufficient to prove that such notice was properly directed and that it was put into the post-office at such time as aforesaid.

The amended articles of association of the alleged plaintiff corporation were read as follows:

9. The directors may from time to time make such calls as they think fit upon the members in respect of all monies unpaid on their shares, and each member shall pay the amount of every call so

made on him to the persons, and at the times and places appointed by the directors. A call may be made payable by instalments.

10. A call shall be deemed to have been made at the time when the resolution authorizing such call was passed.

11. One month's notice of any call shall be given specifying the time and place of payment, and to whom such call shall be paid.

12. If before or on the day appointed for payment any member do not pay the amount of any call to which he is liable, such member shall, unless the directors otherwise determine, be liable to pay interest for the same at the rate of £7 per cent. per annum from the day appointed for the payment thereof to the time of actual payment; and he shall not be entitled to interest on the calls paid while any call is overdue and unpaid.

36. The ordinary general meeting of the company shall be held annually in the month of August in each year, or within twenty days thereafter, at such place in London as the directors may determine.

25 67. The number of directors shall not be less than three nor more than ten.

69. Each director, except the debenture holders' directors, shall hold fifty shares at least in the company, and the office of director shall be vacated:

a. If he cease to hold in his own right at least fifty shares.

b. If he holds any other office or place of profit under the company except that of managing director.

c. If he absents himself from the meetings of the board as hereinafter provided.

d. If he be adjudged bankrupt, or suffer his estate to become vested in any person for the benefit of his creditors, or compounds with his creditors, or suspends payment.

e. If he is individually concerned in or participates in the profits of the company.

f. If he participates in the profits of any work done for the company.

But the above rules shall be subject to the following exceptions:

That no director shall vacate his office by reason of his being a member of or shareholder in any firm or company which has entered into contracts with or done any works for the company; nevertheless he shall not vote in respect of such contract work, and if he does so vote his vote shall not be counted, and he shall incur a penalty not exceeding twenty pounds.

80. The management of the business and the control of the company shall be vested in the directors, who in addition to the powers and authorities by these presents expressly conferred on them may exercise all such powers, and do all such acts and things as may be exercised or done by the company, and are not hereby or by statute expressly directed or required to be done by the company in general meeting, but subject nevertheless to any regulations from time to time made by the company in general meeting; but no regulation shall invalidate any prior act of the directors which would have been valid if such regulation had not been made.

82. The directors may exercise on behalf of the company all, any and every of the powers conferred by "the companies' seals act 1864."

87. The directors shall have authority to enact by-laws for the regulation of the business of the company, provided the same are in accordance with the companies' acts 1862 to 1890, and with the regulations in these articles contained.

139. All members resident out of the United Kingdom shall be required to name a place of address in the United Kingdom at which the notice of the company may be served; and the service of any notice of the company at such place of address shall be sufficient notice to such member.

26 And the certificate of stock, produced in open court by counsel for defendant at the request of counsel for plaintiff, which was as follows, was read:

No. 224. Number of shares, 1,000.

Share Certificate.

The Anglo-American Land Mortgage and Agency Company, Limited.

This is to certify that the Nashua Savings Bank of Nashua, New Hampshire, U. S. A., is the proprietor of one thousand shares of £10 each, numbered 9546 to 10,545, inclusive, in the capital stock of the Anglo-American Land Mortgage and Agency Company, Limited, subject to the articles of association and the rules and regulations of the company, and that up to this day there has been paid up in respect of each of such shares the sum of one pound.

Given under the common seal of said company the fifteenth day of November, 1883.

W. H. RICHARDS,
I. G. BUTTON-BROWNING, *Directors.*
N. BENNETT, *Secretary.*

NOTE.—No transfer of the shares represented by this certificate can be registered until such transfer and certificate have been deposited in the company's office.

And on the back of such said certificate of stock is the following endorsement:

LONDON, 15*th December*, 1892.

A further sum of one pound (£1) per share has been paid on these shares, making two pounds (£2) per share in all.

N. BENNETT, *Manager.*

The plaintiff introduced no evidence whatever that the plaintiff corporation was insolvent at the time of the making of the calls or assessments sued upon, or at the time of the bringing of this suit, or that the call or assessment was made for the benefit of its creditors, or in payment of its debts. No promise, express or implied, to pay such assessments was proven, other than that arising from the ac-

ceptance and retention of the certificate of stock by defendant, and from the articles of association, and rules and regulations referred to in said certificate of stock, and the statutes of Great Britain.

27 The plaintiff read, without objection, the following question and answer, upon cross-examination, from the deposition of Frederick H. Ramsden:—

Int. 1. State, if you know, when the plaintiff company was organized?

Ans. The plaintiff company was organized or incorporated on 31st October, 1882.

The statutes, memorandum and articles of association, certificate of stock, and Frederick H. Ramsden's testimony constitute all the evidence bearing upon the question of plaintiff's incorporation and organization.

The plaintiff offered the following from the amended articles of *of* association of plaintiff corporation:

140. If any member resident out of the United Kingdom neglect to give such address as is here-before required, notices for him may be posted up in a conspicuous place in the registered office of the company: and for all the purposes of these regulations the registered office of the company shall be deemed to be the registered place of abode of such member.

To the reading of the foregoing article, the defendant duly and seasonably excepted, on the ground that it made a distinction between resident and foreign stockholders and is invalid for that reason.

The plaintiff, after reading section 25 of the companies' act of 1862, laws of Great Britain, as follows:

25. Every company under this act shall cause to be kept in one or more books a register of its members, and there shall be entered therein the following particulars:

1. The names and addresses, and the occupations, if any, of the members of the company, with the addition, in case of a company having a capital divided into shares, of a statement of the shares held by each member, distinguishing each share by its number:

And of the amount paid or agreed to be considered as paid on the shares of each member:

2. The date at which the name of any person was entered in the register as a member.

3. The date at which any person ceased to be a member; and any company acting in contravention of this section shall incur a penalty not exceeding five pounds for every day during which its default in complying with the provisions of this section continues, and every director or manager of the company who shall knowingly and wilfully authorize or permit such contravention shall incur the like penalty.

28 Plaintiff offered in evidence a duly attested copy of an extract from the plaintiff's book, called a register of members, filed with the clerk of this court, and notice given as required by rule 14. No objection is made as to the same not being a copy, except that the defendant claims that it was not a full copy of the

records, but only a copy of defendant's account from the plaintiff company's book called the register of members. Said extract was offered for the purpose of showing the plaintiff had duly complied with the laws of England directing a registry of shareholders, so far as the Nashua savings bank was concerned, and that the Nashua savings bank was a registered shareholder and for no other purpose. Objection to the admission of this evidence was made by the defendant, and subject to exception the evidence was submitted by the court as follows:

Mr. FRINK: We object to it in the first place, because it is simply an extract from what otherwise appears to be an entire record. It is simply a mutilation, as I may say, of the entire record. In the next place, it is simply a declaration in their own favor without knowledge being brought home to this defendant that there was any such thing appearing upon their books; and again that it would appear that there may have been a registry of all the shareholders in the company appearing upon the books, and this is but a partial extract from that record, and not a complete extract from the record.

The COURT: I will rule that, if the entire record were here, I should not allow anything read except this. This appears to be the entire record relating to this defendant. I will admit it for the purpose stated only. Exception may be saved.

To this ruling the defendant duly and seasonably excepted on the grounds stated above. The extract of the register of members, offered and excepted to as above, is as follows:

164. Nashua Savings Bank, Nashua, New Hampshire.

Shares registered and purchased.						Capital paid.			
Date.	Register. No.	Transfer. No.	No. of shares.	Distinctive from.	Numbers. No.	Date.	No. of shares.	Per shares.	Amount.
1883. Oct. 18	.....	5	1,000	9,546	10,545	1883. Oct. 18	1,000	20%	1,000
						1885 Oct. 30	.....	10%	500
						153 Dec. — 177	.....	10%	500
									2,000

29 I, Frederick Herbert Ramsden, secretary of the Anglo-American Land Mortgage and Agency Company, Limited, do hereby certify that the foregoing is a true and complete extract from the original records of the company.

In further testimony whereof the seal of the company has by

order of the board been affixed hereto this tenth day of December, 1895.

F. H. RAMSDEN, *Secretary.* [L. S.]

Attest: H. RAMSDEN.

——— ———,
——— ———,
Directors.

After the above paper was read in evidence, the court said to the jury:

You understand, gentlemen of the jury, that does not relieve the plaintiff from proving the defendant was a shareholder and liable for this assessment. It only shows that the plaintiff has complied with the law, assuming the bank was a shareholder. That is all.

After the plaintiff rested its case defendant read articles 14, 15, 16, 17, 18, 19 and 20 of the articles of association of the plaintiff company, which articles of association had been introduced in evidence by plaintiff, the sections read being as follows:

14. The company shall always have a paramount lien on the shares not fully paid of each member, and on the interest or dividend declared or payable in respect thereof for securing to the company the payment or performance of all his debts, liabilities and engagements to or with the company, whether contracted alone or jointly with any other person, whether a member or not, and such lien shall attach to shares in the hands of the executors or administrators of a deceased member, and the company may enforce such lien by sale or forfeiture of the shares on which the same may attach or any part of them.

15. If any member fail to pay any call due on the appointed day the company may, at any time thereafter during such time as the calls remain unpaid, serve a notice on him requiring him to pay such call, together with the interest which may have accrued by such non-payment.

16. The notice shall name a day and place or places on and at which such call, with interest, is to be paid. It shall also state that in the event of non-payment at the time and place appointed, the share or shares in respect of which such call was made will be liable to forfeiture, reserving, however, the company's right to sue for such calls.

17. If the requisitions of any such notice as aforesaid be not complied with, any share or shares in respect of which such notice has been given may be forfeited by a resolution of the directors to that effect.

18. Any share or shares so forfeited shall be deemed to be the property of the company, and may be disposed of in such manner as the company think fit.

19. Any member whose shares have been forfeited shall, notwithstanding, be liable to pay to the company all calls owing upon such shares at the time of the forfeiture, with interest.

20. If all calls, interest and expenses due in respect of any forfeited shares are paid before such shares have been disposed of to-

gether with such legal expenses as may have been incurred by the company in respect of such non-payment as aforesaid, whether judicial or extrajudicial, the forfeiture may be remitted by the directors at their discretion: and if the forfeiture be so remitted, such shares shall then revert to the person entitled thereto previously to the forfeiture and be held by him thereafter, in the same manner as if no such forfeiture has taken place.

At the close of all the evidence in the case, and before the court charged the jury, the defendant moved that the court direct a verdict for the defendant on the pleadings and evidence in the case, for the reasons hereafter specifically stated.

Because (1) the declaration sets up an action in case, when it should have been in debt.

Because (2) the plaintiff is an alien corporation and the declaration contains no averment or allegation as to the law of Great Britain under which it is claimed said corporation was organized.

Because (3) the declaration contains no averment or allegation of any law of England or Great Britain authorizing the plaintiff to make the call or assessment sought to be recovered herein.

Because (4) the declaration contains no averment or allegation that said call or assessment was necessary to pay the debts of the plaintiff, or was made for the benefit of its creditors, and contains no averment or allegation upon what condition the plaintiff was authorized to make such calls or assessments and collect the same.

Because (5) the declaration contains no averment or allegation that any notice was ever given of such call or assessment to defendant.

Because (6) the declaration contains no averment or allegation that the defendant ever made any express promise to pay any such call or assessment.

31 Because (7) the declaration contains no direct averment or allegation that the payment of such call or assessment was ever demanded of defendant.

Because (8) the declaration contains no averment or allegation of the conditions or terms of the defendant's subscription to the stock of the plaintiff.

Because (9) the declaration contains no direct averment or allegation that the defendant was a stockholder in said company at the time said call or assessment was made.

Because (10) there was no evidence in the case of an express promise on the part of the defendant to pay such call or assessment.

Because (11) there was no evidence in the case that this suit was instituted or carried on for the benefit of the creditors of the plaintiff, or that this call or assment was made for the payment of debts or other obligations of the plaintiff; and because the evidence tended to show that the plaintiff was not insolvent at the time of making the call or assessment or at the time of the institution of this suit.

Because (12) this action to recover calls and assessments cannot, in the absence of an express promise to pay on the part of the defendant, be maintained, unless to enforce the collection of the sum due

thereon for the benefit of the creditors of the plaintiff corporation, or in payment of its debts.

Because (13) this remedy, under a statute of England and Great Britain, if enforcible at all, should be in debt.

The court refused to direct a verdict for any of the reasons stated, to which refusal the defendant seasonably excepted.

The court in charging the jury said in part as follows:

"Now, under the decisions of the Supreme Court of the United States it would be sufficient to show that this plaintiff corporation is a corporation *de facto*, and, under the same decisions, the retention by the defendant of the certificate of stock for a number of years, produced at the trial by the defendant upon request of the plaintiff, might operate as an estoppel to prevent the defendant from denying that the plaintiff is a corporation, at least, a corporation *de facto*. However, it is not necessary to pass on that question, because I am sure that the plaintiff has proven the issue in its favor so
32 clearly that I would not be authorized to submit it to the jury; and I am required, under the rule which prevails in this court, not to allow an issue to go to the jury when it is plain the court must set aside the finding of the jury, if in a certain direction. It is plain that under that practice I am required to pass on this question, although to a certain extent, it involves what may technically be called a question of fact.

* * * * * * *

Now, considering these statutes proved by the testimony of Ramsden, there is no doubt that the proceedings under the statutes which have been exhibited by the plaintiff here, constituted a corporation as alleged by the plaintiff, not only *de facto* but *de jure*. Nothing whatever has been pointed out to indicate that the statutes of Great Britain were not in all respects strictly complied with. Therefore that issue I find for the plaintiff."

To this ruling of the court, that the plaintiff sufficiently showed it was a corporation *de facto*, the defendant duly excepted as being against the law and the evidence.

The court in its charge to the jury said in part as follows, as hereinbefore recited:

"Now, under the decisions of the Supreme Court of the United States, it would be sufficient to show that this plaintiff corporation is a corporation *de facto*, and, under the same decisions, the retention by the defendant of the certificate of stock for a number of years produced at the trial by the defendant upon request of the plaintiff, might operate as an estoppel to prevent the defendant from denying that the plaintiff is a corporation—at least, a corporation *de facto*."

To this ruling of the court, that the retention of the certificate of stock produced by the defendant at the trial might operate as an estoppel, the defendant duly and seasonably excepted.

The court, in charging the jury, said in part as follows:

"In meeting this issue, we first have to deal with the testimony of Ramsden, who, in the answer to the first question put to him, states

that he is an English solicitor, and that he is very fully acquainted with the laws of Great Britain. His answer I need not read; it is in the record. This testimony of Ramsden not having been met or qualified or put in issue by anything which further appeared in the case, there is no doubt that I am not required to submit to the jury whether or not he is competent to give evidence of the kind which he has given. There is no doubt that, if the jury should find
33 that he is not competent, I should be compelled to set aside the finding. He is clearly inside of the practical rule applied in *Hall v. Costello*, 48 N. H. 176. So, as already said, I would not be justified in submitting the issue to the jury under these circumstances. I am not compelled to find that he is competent as a barrister would be competent, or that he is competent to testify to the unwritten law of England; but I do find he can testify to the extent he has testified,—that is to say, that he is competent to testify that the printed statutes he has produced are laws of Great Britain, — at least until there is some evidence to meet his testimony or qualify it in some way. I think I am fully within the rule in that particular laid down by the supreme court of this State in *Hall v. Costello*, already referred to, and which on this question, it being a question of the introduction of evidence as a mere matter of proceeding and as a mere rule of practice, controls me, although except for that decision I should be compelled to find that the statutes of Great Britain could not be proved in the way the plaintiff has undertaken to prove them."

To the foregoing ruling of the court, that the statutes of Great Britain had been duly proved, the defendant duly and seasonably excepted.

The court, in charging the jury, said in part as follows:

"The next question in logical order is as to the law of the place which governs the relations of the parties to the alleged implied or expressed contract upon which the suit is brought. The cases to which I refer, namely, *Canada Southern R. R. v. Gebhard*, 109 U. S. 537, and *Hawkins v. Glenn*, 131 U. S. 329, leave this question in no doubt whatever, even if I had any doubt independently of them. The most striking illustration of this rule is *Relfe v. Rundle*, 103 U. S. 222, 226, wherein, among other things, it was said: 'Every corporation necessarily carries its charter wherever it goes, for that is the law of its existence.' The *habitat* of the plaintiff corporation is London, and the parties, by their own free act, have submitted themselves to the laws of Great Britain with reference to their mutual relations, and to all the acts of the corporation done at its domicile which are consistent with those laws. Therefore, I must be governed by the laws of Great Britain, so far as they are shown in the case, and, so far as they are not shown in the case, I must presume them to be the fundamental principles of the common law, with reference to which the Federal courts are govered by their own rules, and do not accept the decisions of the local courts, except so far as those decisions approve themselves to their judgment. In other words, to state the matter accurately, in so far as the laws of Great Britain are not proved, I am undoubtedly bound to assume that

they are the same as the laws of New Hampshire, where this court is sitting; but as to the laws of New Hampshire, with reference to a question of a general character, we are not ontrolled by the decisions of the courts of New Hampshire, except they commend themselves to our own judgment. Decisions of ie courts are, at the most, only evidence of what the law is, and, hen decisions are so conflicting as they now are, they are some-mes very slight evidence."

To this ruling of the court, as to the law of the place which gov-rns the relations of the parties in this suit, the defendant duly and easonably excepted.

In charging the jury the court said in part as follows, as herein-efore recited:—

"In so far as the laws of Great Britain are not proved, I am un-oubtedly bound to assume that they are the same as the laws of ew Hampshire, where this court is sitting."

To this ruling of the court, that, so far as the laws of Great Britain re not proved, they must be assumed the same as the laws of New lampshire, the defendant duly and seasonably excepted.

The court, in charging the jury, said in part as follows:

"The *habitat* of the plaintiff corporation is London, and the parties, y their own free acts have submitted themselves to the laws of reat Britain with reference to their mutual relations and to all the cts of the corporation done at its domicile which are consistent ith those laws. Therefore, I must be governed by the laws of reat Britain, so far as they are shown in the case; and, so far as ey are not shown in the case, I must presume them to be the funda-ental principles of the common law, with reference to which the ederal courts are governed by their own rules and do not accept e decisions of the local courts except so far as those decisions pproved themselves to their judgment. In other words, to state e matter accurately: in so far as the laws of Great Britain are not rove-, I am undoubtedly bound to assume that they are the same s the laws of New Hampshire, where this court is sitting; but, as the laws of New Hampshire, with reference to a question of a eneral character, we are not controlled by the decisions of the ourts of New Hampshire, except as they commend themselves to ur own judgment. Decisions of the courts are, at the most, only vidence of what the law is; and, when decisions are so conflicting as they now are, they are sometimes very slight evidence."

To this ruling of the court, that it must presume, in the absence of proof of the laws of England, such laws to be the ndamental principles of the common law, and the Federal courts o not accept the decisions of local courts, except so far as those de-isions approve themselves to their judgment, the defendant duly nd seasonably excepted.

The court, in charging the jury, said in part as follows:

"We have left, then, the decisions of the three courts in Maine, ew Hampshire and Massachusetts, and in these three States it ust be conceded by the plaintiff that the law is settled beyond all oubt,—without undertaking to distinguish the peculiar facts in

each case,—it is the settled law, so far as the courts can settle it, that this action could not be maintained except for an expression in the statutes of Great Britain, to which I will call attention later, and which expression would, perhaps, be sufficient to save it. Those decisions are declared in Cook on Stockholders, 3d ed. sec. 71, and Morawetz, 3d ed. sec. 128, and sequence, to be contrary to the great weight of authority, and I have no doubt they are so, and are contrary to principle. They seem to have grown out of some early decisions in Massachusetts, the precise nature of which I have not had time to investigate, and have not found it necessary to investigate. I think that, possibly, in these early decisions, too much weight was given to the provision of the statutes which were enacted in all three States, providing for the forfeiture and sale of stock for unpaid assessments. However, it is clear in my mind, that this doctrine is contrary to the ordinary principle of law.

* * * * * * *

Now as to the statutes of Great Britain, which under the circumstances, and under the authorities I have referred to, govern the contract between the parties, section 16 of the companies' act, Exhibit 1, provides that,

'All moneys payable by any member of the company, in pursuance to the conditions or regulations of the company, or any such conditions or regulations, shall be deemed to be a debt due from such member to the company, and in England and Ireland to be in the nature of a specialty debt.'

* * * * * * *

The fact that this provision of the statutes to which I have referred existed, and that there are also in the same statutes certain provisions for the forfeiture of stock in case of non-payment or assessments, sets aside this case entirely from all those where the courts have been inclined to hold that the granting of a right to forfeit and sell stock is by implication exclusive. That is to say, there
36 is a class of cases where the courts justly hold that, even if at common law there would be an implied promise to pay, yet, where the statute provides forfeiture and sale, that remedy is exclusive. But when the statute provides both forfeiture and sale, and that the assessment when called for shall stand as a debt—when the two are found in the same statute, the correct rules of construction, they should both be considered as concurrent remedies; although the court would also be compelled to hold that, if the parties plaintiff elected to proceed by forfeiture and sale, they could not afterwards proceed by an action, or, if by action, that they could not afterwards proceed by forfeiture and sale."

To this ruling of the court that the remedy of forfeiture and sale was not exclusive, the defendant duly and seasonably excepted.

The court, in charging the jury, said in part as follows, as hereinbefore recited:

"We have left, then, the decisions of the three courts in Maine, New Hampshire and Massachusetts. And in these three States it must be conceded by the plaintiff that the law is settled beyond all

doubt—without undertaking to distinguish the peculiar facts in each case—it is the settled law, so far as the courts can settle it, that this action could not be maintained except for an expression in the statutes of Great Britain, to which I will call attention later, and which expression would, perhaps, be sufficient to save it.

* * * * * * *

However, it is clear in my mind that this doctrine is contrary to the ordinary principle of law, which in this case is this,—the delivery to and receipt by the defendant of one thousand shares of the stock of the plaintiff corporation, such stock not being paid for, is like the delivery of any other property from one person to another where the circumstances do not imply a gratuity. The law is well settled that, whenever property of value is delivered from A. B. to C. D. under such circumstances as to show it is not a gratuity, C. D., by accepting delivery and retaining the property, impliedly promises to pay for it. This stock has not been paid for, and the defendant owes for it on fundamental principles of law; he owes for it to make payments at the times and in the instalments provided for in the articles of association. It is like the case of the delivery of other property which parties understand is to be paid for in instalments."

To this ruling of the court, that the receipt of the certificate of stock by the defendant company raises an implied promise to pay for it, the defendant duly and seasonably excepted.

37 The court, in charging the jury, said in part as follows:

"We have left, then, only the question of the form of action. Upon that question the court has no doubt that the count relied on is sufficient, and not only sufficient, but is in the best form for a proceeding of this character, and in the form less liable to raise unnecessary questions than any other possible form."

To this ruling of the court, that this action need not be in debt, but might be in *indebitatus assumpsit* the defendant duly and seasonably excepted.

The court, in charging the jury, said in part as follows:

"As to the statutes of Great Britain, which, under the circumstances, and under the authorities I have referred to, govern the contract between the parties, section 16 of the companies' acts, Exhibit , provides that 'All monies payable by any member of the company, in pursuance of the conditions or regulations of the company or any of such conditions or regulations, shall be deemed to be a debt due from such member to the company, and in England and Ireland to be in the nature of a specialty debt.' That, under the decisions to which I have referred, is clearly a part of the implied contract—might say, the express contract—between these parties. At any rate, it would be safe to say it was a part of the implied contract into which these parties entered when they became shareholders in the corporation. So, independently of the rules of the common law, and even if I were controlled by the local decisions of Maine, New Hampshire and Massachusetts, this case would be excepted from them, and should find here that there was an express agreement on the part of the defendant here—not a direct contract, but arising from the re-

lations of the parties under the legislation of Great Britain—to pay this assessment. So in any view of the case, it is impossible for me to escape the conclusion that the defendant is liable in some way for this call."

To this ruling of the court, that the evidence of an agreement may be implied from the relation of the parties under the laws of Great Britain, the defendant duly and seasonably excepted.

The court, in charging the jury, said, in part, as follows:

"Now, if this case was at common law and based on common-law principles, there would be no question that this is the right form of action. Therefore, inasmuch as, in my view, this suit can be maintained on common-law principles and independently of the statutes of Great Britain, to which I have referred, perhaps I have gone far enough."

38 To this ruling of the court, that this suit can be maintained on common-law principles and independently of the statutes of Great Britain, the defendant duly and seasonably excepted.

The court, in charging the jury, said in part as follows:

"It is not really maintained by the defendant that there is any evidence here that the particular call or assessment in issue has been paid. And it is of no sort of consequence, so far as this case is concerned, what happened about other calls or assessments. If the defendant has paid this call, it is for the defendant to show it, and to overcome, by some evidence, the implication arising from what appears on the certificate of stock, that a large percentage of the par value of this stock has not been paid. The burden of proof is upon the defendant to show that this particular assessment in issue has been paid."

To this ruling of the court, that the burden of proof was upon the defendant to show non-payment, the defendant duly and seasonably excepted.

The court directed a verdict for the plaintiff, as follows:

"I wish, gentlemen of the jury, to say to you that there is no responsibility in this case resting upon your shoulders. It is on the shoulders of the court. I am liable to be in error, but, if I err, the court of appeals will set me right. I, therefore, instruct you to return a verdict in favor of the plaintiff for the amount claimed, with interest at 5 per cent. per annum, from Dec. 2, 1895."

Whereupon the defendant objected to this instruction as being against the pleadings and evidence for the reasons hereafter specifically stated.

Because (1) the declaration sets up an action in case, when it should have been in debt.

Upon this ground the defendant duly and seasonably excepted to the instructions directing a verdict for plaintiff.

Because (2) the plaintiff is an alien corporation, and the declaration contains no averment or allegation as to the law of Great Britain and England under which it is claimed said corporation was organized.

Upon this ground the defendant duly and seasonably excepted to the instructions directing a verdict for plaintiff.

39 Because (3) the declaration contains no averment or allegation of any law of England or Great Britain authorizing the plaintiff to make the call or assessment sought to be recovered herein.

Upon this ground the defendant duly and seasonably excepted to the instructions directing a verdict for plaintiff.

Because (4) the declaration contains no averment or allegation that said call or assessment was necessary to pay the debts of the plaintiff or was made for the benefit of its creditors, and contains no averment or allegation upon what condition the plaintiff was authorized to make such calls or assessments and collect the same.

Upon this ground the defendant duly and seasonably excepted to the instructions directing a verdict for plaintiff.

Because (5) the declaration contains no averment or allegation that any notice was ever given of such call or assessment to defendant.

Upon this ground the defendant duly and seasonably excepted to the instructions directing a verdict for plaintiff.

Because (6) the declaration contains no averment or allegation that the defendant ever made any express promise to pay any such call or assessment.

Upon this ground the defendant duly and seasonably excepted to the instructions directing a verdict for plaintiff.

Because (7) the declaration contains no direct averment or allegation that the payment of such call or assessment was ever demanded of the defendant.

Upon this ground the defendant duly and seasonably excepted to the instructions directing a verdict for plaintiff.

Because (8) the declaration contains no averment or allegation of the conditions of defendant's subscription to the stock of said plaintiff.

Upon this ground the defendant duly and seasonably excepted to the instructions directing a verdict for plaintiff.

40 Because (9) the declaration contains no direct averment or allegation that the defendant was a stockholder in said company at the time said call or assessment was made.

Upon this ground the defendant duly and seasonably excepted to the instructions directing a verdict for plaintiff.

Because (10) there was no evidence in the case of an express promise on the part of the defendant, to pay such call or assessment.

Upon this ground the defendant duly and seasonably excepted to the instructions directing a verdict for plaintiff.

Because (11) there was no evidence in the case that this suit was instituted or carried on for the benefit of the creditors of the plaintiff, or that this call or assessment was made for the payment of debts or other obligations of the plaintiff; and because the evidence tended to show that the plaintiff was not insolvent at the time of making the call or assessment, or at the time of the institution of this suit.

Upon this ground the defendant duly and seasonably excepted to the instructions directing a verdict for the plaintiff.

Because (12) this action to recover calls and assessments cannot,

in the absence of an express promise to pay on the part of the defendant, be maintained, unless to enforce the collection of the sum due thereon for the benefit of the creditors of the plaintiff corporation or in payment of its debts.

Upon this ground the defendant duly and seasonably excepted to the instructions directing a verdict for plaintiff.

Because (13) this remedy, under the statute of Great Britain, if enforcible at all, should be in debt.

Upon this ground the defendant duly and seasonably excepted to the instructions directing a verdict for plaintiff.

After the charge of the court, the defendant, by permission of the court, requested the court to give the following instructions:

41 "The court is requested to instrut the jury that, if any action can be maintained for the recovery of the sum due under the call and assessment sought to be enforced in this action by the plaintiff, the lien thereon must be enforced by sale and forfeiture of these shares before this action can be maintained."

The court refused to instruct the jury as requested, to which refusal the defendant duly and seasonably excepted.

The entire charge to the jury is made a part of this bill of exceptions, and is as follows:—

PUTNAM, *J.*:

"MR. FOREMAN AND GENTLEMEN OF THE JURY: Counsel during yesterday and the day before have fully argued certain questions involved in this case, and I am satisfied that the issues are for the court and in no way for the jury. I might, perhaps, so far as my duties are concerned, comply with them by simply instructing the jury what verdict to enter; but I think I will better save the rights of the parties by making in your presence my observations on the propositions of law submitted by counsel and other propositions submitted by them,—the observations I make to be regarded as a charge to the jury.

The first question which comes in logical order is whether or not the plaintiff in this case has met the issue raised by the defendant, that the plaintiff is not a corporation duly organized under the laws of Great Britain.

Under the statutes of New Hampshire regulating the forms of pleadings, there can be no doubt that the position of the defendant is correct, that this question can be raised under a special plea in bar of *nul tiel* corporation, and the defendant is not limited to a plea in abatement; and under the practice act of New Hampshire, the issue having been noticed in a special statement of the grounds of defence, it is open here and must be met. Those United States Supreme Court decisions which hold the pleading of the general issue waives the question of the existence of the plaintiff as a corporation, are not applicable, because, of course, the issue cannot be raised except by special plea, although it is a plea in bar.

Now, under the decisions of the Supreme Court of the United States, it would be sufficient to show that this plaintiff corporation is a corporation *de facto;* and, under the same decisions, the reten-

tion by the defendant of the certificate of stock for a number of years, produced at the trial by the defendant upon request of the plaintiff, might operate as an estoppel to prevent the defendant from denying that the plaintiff is a corporation—at least, a corporation *de facto*. However, it is not necessary to pass on that question, because I am sure that the plaintiff has proven the issue in
42 its favor so clearly that I would not be authorized to submit it to the jury; and I am required, under the rule which prevails in this court, not to allow an issue to go to the jury when it is plain the court must set aside the finding of the jury if, in a certain direction—it is plain that under that practice I am required to pass on this question; although, to a certain extent, it involves what may technically be called a question of fact.

Now, in meeting this issue, we first have to deal with the testimony of Ramsden, who, in the answer to the first question put to him, states that he is an English solicitor, and that he is very fully acquainted with the laws of Great Britain. His answer I need not read; it is in the record. This testimony of Ramsden not having been met, or qualified, or put in issue by anything which further appeared in the case, there is no doubt that I am not required to submit to the jury whether or not he is competent to give evidence of the kind which he has given. There is no doubt that, if the jury should find he is not competent, I should be compelled to set aside the finding. He is clearly inside of the practical rule applied in *Hall v. Costello*, 48 N. H. 176. So, as already said, I would not be justified in submitting the issue to the jury under these circumstances. I am not compelled to find that he is competent as a barrister would be competent, or that he is competent to testify to the unwritten law of England; but I do find he can testify to the extent he has testified—that is to say, that he is competent to testify that the printed statutes he has produced are laws of Great Britain—at least until there is some evidence to meet his testimony or qualify it in some way. I think I am fully within the rule in that particular laid down by the supreme court of this State in *Hall v. Costello*, already referred to and which, on this question, it being a question of the introduction of evidence as a mere matter of proceeding and as a mere rule of practice, controls me, although, except for that decision, I should be compelled to find that the statutes of Great Britain could not be proved in the way the plaintiff has undertaken to prove them.

Now, considering these statutes proved by the testimony of Ramsden, there is no doubt that the proceedings under statutes which have been exhibited by the plaintiff here, constituted a corporation as alleged by the plaintiff, not only *de facto* but *de jure*. Nothing whatever has been pointed out to indicate that the statutes of Great Britain were not in all respects strictly complied with. Therefore that issue I find for the plaintiff.

Then there is no doubt that the call for this assessment has been properly proven. The only possible question which could have arisen was whether or not certain persons were the directors of the corporation at the time of the call. As to that, no issue was made.

Ramsden testified, without objection, that such and such persons, being those named in the record of the meeting of the
43 directors at which the call was made, were the directors of the company for that time, and that all were present at that meeting. Perhaps, if the point had been made very closely, he would not have been allowed to have testified in that precise form, but he might have been allowed to testify that they were acting as directors. But no objection was made on that point, and it was very evident that the parties all knew that they were the directors, and intended to make no objection. Therefore, as the amended articles of association provide that calls may be made by the directors, there can be no doubt that the call in issue was properly made.

No question was made as to the regularity of the meeting of the directors. Therefore, nothing need be said about that.

Then as to the notice of the call. It is plain from the testimony that the notice was posted as required by the articles of association of the corporation. It is also plain from the testimony of Ramsden, and of the treasurer of the defendant corporation, that the notice was mailed to the defendant corporation and received by it. In view of the fact of which we must all take cognizance, that the postal service between the United States and London is international under treaty arrangements, the presumption which arises under domestic postal service, that a notice properly posted and mailed was duly received arises here. But in addition to that, although the treasurer does not personally recollect all the details about the notice, when it was received, etc., still it cannot be questioned that the jury should find that the notice was received by the bank before the call was payable, which was on the 2d of December, 1895, if I am correct.

Several objections were taken to the effect that the several transactions of the corporation proven by the plaintiff in this case were not brought to the notice of the defendant. But in view of the fact that it is clear, as I shall show with reference to the next point, that the defendant was at that time a stockholder in the corporation, it follows that, by fundamental principles of law, it is bound by all the ordinary transactions of the corporation, and is presumed to have knowledge of them all, and to be a party to them all. I, of course, exclude from this the entries made on the books of the corporation for the immediate purpose of charging the defendant. Entries of that character are not admissible. I am speaking simply of the general, ordinary proceedings of the corporation. That is a general principle of law, and is so strongly stated by the Supreme Court that I think I ought to refer to the decision of that court in which the principle has been stated.

In *Canada Southern R. R. v. Gebhard*, 109 U. S. 537, the court says: 'It follows that every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government, affecting the powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes. To all intents and
44 purposes, he submits his contract with the corporation to such a policy of the foreign government, and whatever is done by

that government in furtherance of that policy which binds those in like situation with himself, who are subjects of the government, in respect to the operation and effect of their contracts with the corporation, will necessarily bind him. He is conclusively presumed to have contracted with a view to such laws of that government, because the corporation must of necessity be controlled by them, and it has no power to contract with a view to any other laws with which they are not in entire harmony.'

That applies to so much of the general rules which I have stated as concern the laws of Great Britain, and to those laws so far as they affect this corporation, and as this corporation has proceeded with reference to them.

The statement which I made is completed by a reference to *Hawkins v. Glenn*, 131 U. S. 329. 'A stockholder is so far an integral part of the corporation that, in view of the law, he is privy to the proceedings touching the body of which he is a member.'

That is all I need to read from that case. Those two cases settle the proposition. The proposition is so fundamental, and well known, it is hardly necessary to refer even to those decisions, and I refer to them, not so much because they establish the proposition as because they establish another proposition to which I will call attention further on.

Now then, that the defendant corporation was a stockholder in the plaintiff corporation at the time the assessment was made is clearly and indisputably shown by the certificate of stock, bearing date some twelve years before the call, which certificate was produced by the defendant on notice here in court, and which, I must assume, the jury would find has been in the possession of the defendant corporation for a great many years.

Its power to take this stock under the laws of New Hampshire is not questioned in this case, and no issue on that matter arises.

Now, with reference to the relations between the plaintiff and the defendant, so far as these calls are concerned, I wish to make a general observation, in order that I may not be misunderstood: The plaintiff has here only the rights of the corporation itself, and it does not, as the case stands, represent creditors, and it has not the rights of a receiver. Many cases which have been cited to me by the plaintiff must be laid aside because of this distinction, which I will have occasion to refer to again further on.

Attention has been called to the fact that extracts produced here from the plaintiff's register of stockholders show that this stock was not issued directly to the defendant in this case, and that, therefore, the defendant is not chargeable as a subscriber for the stock. But there can be no doubt that the transfer was complete, that it was transferred on the register of the corporation, and that a new
45 certificate was delivered to the defendant, thereby discharging the original subscriber from all liabilities. The novation is complete and the defendant in this case is chargeable with all the liabilities of the original subscriber to the stock, whatever they were. This is so fundamental that it is not necessary to spend much time on it; but I refer to what the court says in *Webster v. Upton*,

91 U. S. 69, as follows: 'If the law implies a promise by the original holders or subscribers to pay the full par value when it may be called, it follows that an assignee of the stock when he comes into privity with the company, by having such stock transferred to him on the company's books, is equally liable.'

The next question, in logical order, is as to the law of the place which governs the relations of the parties to the alleged, implied or express contract upon which the suit is brought. The cases to which I refer, namely, *Canada Southern R. R. v. Gebhard*, 109 U. S. 537, and *Hawkins v. Glenn*, 131 U. S. 329, leave this question in no doubt whatever, even if I had any doubt, independently of them. The most striking illustration of this rule is *Relfe v. Rundle*, 103 U. S. 222, 226, wherein among other things, it was said: 'Every corporation necessarily carries its charter wherever it goes, for that is the law of its existence.'

The *habitat* of the plaintiff corporation is London, and the parties by their own free act have submitted themselves to the laws of Great Britain with reference to their mutual relations, and to all the acts of the corporation done at its domicile which are consistent with those laws. Therefore, I must be governed by the laws of Great Britain, so far as they are shown in the case; and, so far as they are not shown in the case, I must presume them to be the fundamental principles of the common law with reference to which the Federal courts are governed by their own rules, and do not accept the decision of the local courts except so far as those decisions approve themselves to their judgment. In other words, to state the matter accurately, in so far as the laws of Great Britain are not proved, I am undoubtedly bound to assume that they are the same, as the laws of New Hampshire, where this court is sitting; but, as to the laws of New Hampshire, with reference to a question of a general character, we are not controlled by the decisions of the courts of New Hampshire except as they commend themselves to our own judgment. Decisions of the courts are, at the most, only evidence of what the law is; and, when decisions are so conflicting as they now are, they are sometimes very slight evidence.

I desire next to call attention to the fact that this stock was not non-assessable. The certificate on its face shows distinctly the par value of the stock, and also shows distinctly what percentage of the par value had been paid, at least down to December 15, 1892, the same being only a small percentage of the entire par. In short the certificate of stock carries on its face the implication that the
46 balance of the par value of the stock is liable to be called for and that the holder of the certificate is bound to pay it, so far as it is possible to have such an implication without an express promise or something equal to an express promise on the face of the paper. There is no express promise on the certificate, and therefore, in interpreting it, we are called upon to look at the general principles of law which would govern such a case. I merely speak of this to show that there is nothing on the face of the certificate to embarrass the court in this litigation.

Now we come to the main question in the case, and that is,

whether the defendant is liable pecuniarily for this call, or whether the only remedy is, as held by the courts of Maine, New Hampshire and Massachusetts, a forfeiture and sale of the stock; and a loss of what has been paid in upon it by the defendant or its predecessors in title.

Now, at the first blush, there were two or three cases decided by the Supreme Court which seemed to settle the question in favor of the plaintiff, namely, *Hill v. Merchants' Insurance Company* 134 U. S. 515, and *Great Western Telegraph Company v. Purdy*, 162 U. S. 329, 336; but an examination of the facts stated in the case shows that in each case there was an express promise to pay. So, on the other hand, *Scovill v. Thayer*, 105 U. S. 143, 155, contains an expression which, if not read in connection with the rest of the case, would seem to settle the law in favor of the defendant. But in that case the stock was on its face non-assessible, and therefore an action could lie only in favor of some one who represented creditors.

We have left, then, the decisions of the three courts in Maine, New Hampshire and Massachusetts. And in these three States it must be conceded by the plaintiff that the law is settled beyond all doubt—without undertaking to distinguish the peculiar facts in each case—it is the settled law, so far as the courts can settle it, that this could not be maintained except for an expression in the statutes of Great Britain to which I will call attention later, and which expression would, perhaps, be sufficient to save it. Those decisions are declared in Cook on Stockholders, 3d ed. sec. 71, and Morawetz, 2d ed. sec. 128, and sequence, to the contrary to the great weight of authority, and I have no doubt they are so and are contrary to principle. They seem to have grown out of some early decision in Massachusetts, the precise nature of which I have not had time to investigate, and have not found it necessary to investigate. I think that, possibly in these early decisions too much weight was given to the provisions of the statutes, which were enacted in all three States, providing for the forfeiture and sale of stocks for unpaid assessments. However, it is clear in my mind, that this doctrine is contrary to the ordinary principle of law, which in this case is this,—the delivery to and receipt by the defendant of 1,000 shares of the stock of the plaintiff corporation, such stock not being paid for, is like the
47 delivery of any other property from one person to another where the circumstances do not imply a gratuity. The law is well settled that, wherever property of value is delivered from A. B. to C. D., under such circumstances as to show it is not a gratuity, C. D. by accepting delivery and retaining the property, impliedly promises to pay for it. This stock has not been paid for, and the defendant owes for it on fundamental principles of law; he owes for it to make payments at the times and in the instalment provided for in the articles of association. It is like the case of the delivery of other property, which parties understand is to be paid for in instalments. This rule is clearly recognized by the great weight of authority referred to in the text books I have recited. The text books themselves are not authority, and I do not refer to them as

authority, but I refer to them as summing up the most of the decisions, and, in my opinion, summing them up correctly.

Not only is the great weight of authority as stated, but two justices of the Supreme Court have laid down the rule without hesitation, and, I think, under such circumstances, and in cases of so much importance, that we cannot escape the implication that the rule was laid down by those justices with the knowledge and approval of their associates, although in neither case was it necessary to determine this precise question.

So eminent a judge as Mr. Justice Strong, one of the most eminent ever on the bench of the Supreme Court, in *Webster v. Upton*, 91 U. S. 69, has laid down the rule positively, after a long statement, covering two pages, which I need not repeat; he concludes, 'Manifestly that would not be what the law intended; and if its intent was that the whole capital might be called in, it is difficult to see why the subscriber, knowing the intent, and voluntarily becoming a subscriber, does not impliedly engage to pay in full for his shares when payment is required.'

Mr. Justice Hunt, in *Chubb v. Upton*, 95 U. S. 668, also lays down the rule without hesitation, saying, 'The same authorities hold that one who receives a certificate of stock for a certain number of shares at a given sum per share, thereby becomes liable to pay the amount thereof, when called upon by the corporation or its assignee.' Thus putting the two—the corporation and the assignee—on the same footing.

Perhaps, if it was otherwise a doubtful question, these expressions of the two learned justices would not bind me; but being in line with what I regard as undoubted authority and the recognized principles of law applicable under like circumstances, I must hold that, even under the rules of the common law, which govern me here, and independently of the statutes of Great Britain to which I referred, the defendant is liable for this call.

I ought to observe that there is no suggestion here that the call was oppressive, or marked by those features which justify the
48 courts in preventing the enforcement of a call, either by forfeiture or action. There is no doubt but there are some circumstances, as where, for instance, the corporation has ceased to do active business, and owes no debts, under which a call would not ordinarily be enforced by the court; but the proofs here do not show anything on this point, except that the cross-examination by one witness shows, I believe, that there is a large amount of debentures outstanding, but whether the call is necessary to pay up those debentures or not, or whether this corporation is in active operation, has not been called to the attention of the court. At any rate, the defendant has not challenged the call on any such ground as that, and, therefore, the court has not been compelled to investigate anything of that nature.

Now, as to the statutes of Great Britain, which, under the circumstances, and under the authorities I have referred to, govern the contract between the parties, section 16 of the companies' acts, Exhibit 1, provides that 'All monies payable by any member of the

company, in pursuance of the conditions or regulations of the company, or any such conditions or regulations, shall be deemed to be a debt due from such member to the company, and in England and Ireland to be in the nature of a specialty debt.' That, under the decisions to which I have referred, is clearly a part of the implied contract, I might say, the express contract—between these parties. At any rate, it would be safe to say it was a part of the implied contract into which these parties entered when they became shareholders in the corporation. So, independently of the rule of the common law, and, even if I were controlled by the local decisions of Maine, New Hampshire and Massachusetts, this case would be excepted from them, and I should find here that there was an express agreement on the part of the defendant here—not a direct contract, but arising from the relations of the parties under the legislation of Great Britain—to pay this assessment. So in any view of the case, it is impossible for me to escape the conclusion that the defendant is liable in some way for this call.

The fact that this provision of the statutes to which I have referred existed, and that there are also in the same statutes certain provisions for the forfeiture of stock in case of non-payment of assessments sets aside this case entirely from all those where the courts have been inclined to hold that the granting of the right to forfeit and sell stock is by implication exclusive. That is to say, there is a class of cases where the courts justly hold that, even if at common law, there would be an implied promise to pay, yet, where the statute provides for forfeiture and sale, that remedy is exclusive. But when the statute provides both forfeiture and sale, and that the assessment, when called for, shall stand as a debt—when the two are found in the same statute, the correct rules of construction require they should both be considered as concurrent remedies; although the court would also be compelled to hold that, if the parties plaintiff elected to proceed by forfeiture and sale, they
49 could not afterwards proceed by an action, or, if by action, that they could not afterwards proceed by forfeiture and sale.

We have left, then, only the question of the form of action. Upon that question the court has no doubt that the count relied on is sufficient, and, not only sufficient, but is in the best form for a proceeding of this character, and in a form less liable to raise unnecessary questions than any other possible form. The action of *indebitatus assumpsit* has been encouraged by the courts in Great Britain and in this country. The precedent cited by the plaintiff from the second volume of Chitty's Pleadings shows that this action was clearly based on common-law principles independently of statutory principles. That *indebitatus assumpsit* is the recognized form of action for an assessment after call has been made, is undoubtedly established both in this country and Great Britain. But the law as to *indebitatus assumpsit* goes further, and it holds, with some special exceptions, that, wherever a sum of money has become due under such circumstances that any kind of promise may be implied, the party to whom the money is due, instead of declaring specially, may simply allege the debt, and the promise implied from the fact

of the existence of the debt, which together constitutes *indebitatus assumpsit*. And even on policies of insurance, which are full of conditions precedent, the common practice is to count in *indebitatus assumpsit*, not only for money due on the policy, but also for the return premium.

The rules laid down in Chitty's Pleadings for the use of this form of action go to a great extent. Indeed it is the suitable remedy on a foreign judgment where an action of debt does not lie; and in actions on statutes which are not penal, and as to which any sort of an obligation in the nature of a promise can be implied, Chitty on Pleading-, as my recollection is, holds that *indebitatus assumpsit* will lie.

Now, if this case was at common law and based on common-law principles, there would be no question that this is the right form of action. Therefore, inasmuch as in my view this suit can be maintained on common-law principles, and independently of the statutes of Great Britain to which I have referred, perhaps I have gone far enough. Nevertheless, in order to meet all possible contingencies, I may add that I am of the opinion that, if the action rests on the statute which I have cited, it is properly laid in *indebitatus assumpsit*. The statute reads as follows: 'Shall be deemed to be a debt due from such member to the company, and in England and Ireland to be in the nature of a specialty debt.' That is, by this statute it is a debt due all over the world, but in England and Ireland it has the advantages of a specialty debt. Even if it were only a specialty debt everywhere, I have no doubt the action of *indebitatus assumpsit* would lie in this country, although in England it might require an action of debt.

It is a debt all over the world, a debt founded on the charter of this corporation, or on the law which this corporation has adopted as a part of its charter, and it becomes, by virtue of the cases to which I have referred in 103 U. S., 109 U. S. and 131 U. S., an obligation in the nature of promise—a debt arising on such an obligation and, therefore, a debt on which the action of *indebitatus assumpsit* lies.

Even if we were obliged to pass on this question with the understanding that it was a specialty debt, and only a specialty debt, nevertheless the same conclusion would be reached; because, although *Fourth National Bank v. Francklyn*, 120 U. S. 747, held that a statutory liability cannot be enforced in a foreign jurisdiction except in conformity with the condition on which the right of action is given by the statute itself, that clearly does not relate to mere matters of procedure which are not essential in their character to the rights of the parties. It relates to certain preliminary conditions which must be complied with, and also to such questions as whether a party must proceed in equity where all the stockholders and all the creditors can be brought into one suit. It relates to fundamental questions of that character, and to conditions precedent. It relates to questions of procedure, practice and pleading, only when they are fundamental, and so fundamental as to affect the rights of the parties.

Except for this, it would have been impossible for the Federal court sitting in Florida to have done what it did in *Flash v. Conn*, 109 U. S. 371, or for the Federal court sitting in this circuit to act with reference to any statutory right arising in New York or in Louisiana, where remedies are under the code or according to the civil law, while remedies here are at common law. The cases cited in *Fourth National Bank v. Francklyn* have no reference to such fine distinctions as those between actions of debt or *indebitatus assumpsit*, or as between actions of case and trespass, as necessarily follows from the rules laid down in *Stewart v. Baltimore & Ohio Railroad Company*, 168 U. S. 445.

Therefore, even if in Great Britain, the action could lie only in debt, because this obligation is in the nature of a specialty, yet that could not apply to proceedings local under the practice in the four States forming this circuit, where, on foreign judgments and on foreign statutes in many cases, *indebitatus assumpsit* clearly lies.

The suggestion was made that the plaintiff was undoubtedly relying on the statute of Great Britain, and that the declaration was insufficient because it did not refer to the statute. But a foreign statute is not like a domestic statute. It is not a part of the law of the land; it is only one fact out of other facts; and while, therefore, even if in a special count, it would be necessary to refer to this statute, it would not be necessary to do so on any rule of
51 pleading applicable to *indebitatus assumpsit*, any more than it is necessary to state any other special fact. I do not think, even if it were a domestic statute, it would be necessary to refer to it. I understand a party is entitled to declare in debt or *indebitatus assumpsit*, and to maintain his action on the statute or at common law, as best he can unless in the case of a penal statute. Moreover this action is not founded on the statute. The statute simply defines the relations of the parties, and the action is based on those relations as thus defined, and on the fact that the parties have voluntarily obligated themselves to be bound by the statute. Even if the action necessarily found its origin in the statute, I should say that it flowed out of the statute through the voluntary acts of the parties establishing mutual relations between them, rather than that it was based upon the statute. Therefore, I am compelled to hold that this liability exists, and that the count in the case is sufficient.

A question arose about the answer to interrogatory 45 in the deposition of Ramsden. When that was read I was unable to exclude it, because it did not appear on the face of the answer whether or not the facts were within the personal knowledge of the witness, and an exception was taken. I observed that I could not take that from the jury, as it might be a question of fact for them to determine, whether he knew of his own personal knowledge the matters testified to. Of course, at that time I could not say what the questions to be disposed of in the case would be, nor did I know but that the question and answer might relate to something material in the case. It is perfectly plain now that the whole matter is absolutely immaterial, and no consideration could be given to it either by me or by the jury, as the evidence now stands. It is not really maintained

by the defendant that there is any evidence here that the particular call or assessment in issue has been paid. And it is of no sort of consequence, so far as this case is concerned, what happened about other calls or assessments. If the defendant has paid this call, it is for the defendant to show it, and to overcome, by some evidence, the implication arising from what appears on the certificate of stock, that a large percentage of the par value of this stock has not been paid. The burden is upon the defendant to show that this particular assessment in issue has been paid. Therefore, I regard this question and answer, as the case has terminated, entirely immaterial, which, therefore, should in no way trouble the jury.

The plaintiff claims interest at seven per cent. per annum. Interest should be computed from the time the assessment was due, which was Dec. 2, 1895, to this date. I do not, however, see any authority for computing interest at seven per cent. Perhaps the plaintiff may point out some authority, but I have not seen any. I do not regard the mere determination of the corporation to demand seven per cent. authorized by its articles of association or by the law.

If the counsel submit the question to my discretion, I shall
52 fix the rate of interest at the same rate as fixed in the English courts,—five per cent. per annum.

I wish, gentlemen of the jury, to say to you that there is no responsibility in this case resting upon your shoulders. It is on the shoulders of the court. I am liable to be in error, but if I err, the court of appeals will set me right. I, therefore, instruct you to return a verdict in favor of the plaintiff for the amount claimed, with interest at five per cent. per annum from Dec. 2, 1895."

The jury found a verdict, as instructed, in the sum of $6,858.67.

All of the exceptions to the foregoing rulings and refusals to rule were duly and seasonably alleged and saved, and the defendant asks that these exceptions be allowed.

C. J. HAMBLETT.
A. T. BATCHELDER.
J. S. H. FRINK.

It is hereby stipulated on the part of the plaintiff that the foregoing bill of exceptions be settled and allowed, and that the clerk insert the amount of the verdict.

GILBERT A. DAVIS,
OMAR POWELL,
Attorneys for Plaintiff.

United States Circuit Court, District of New Hampshire, October Term, 1898.

An order having been seasonably entered at the term at which the case was tried that the foregoing bill of exceptions might be allowed after the adjournment of the term with the same effect as before the term adjourned, and the same having been presented to the court within the time fixed by the court, it is hereby allowed,

the same, however, having been amended by the court subsequently to the agreement of counsel attached thereto.

WILLIAM L. PUTNAM,
United States Circuit Judge.

October 29, 1898.

53 And thereafter, to wit, on the first day of March, A. D. 1899, the following agreement as to judgment is entered :—

Agreement as to Entering Judgment.

(Filed March 1, 1899.)

Parties hereby stipulate that judgment for $6,858.67, the amount of verdict and interest at five per cent. from June 30, 1898, to date of judgment, together with costs, may be entered by the Honorable Edgar Aldrich, United States district judge, not hereby waiving exceptions taken at trial.

NASHUA SAVINGS BANK,
By its attorney, J. S. H. FRINK.
ANGLO-AMERICAN LAND MORTGAGE & AGENCY COMPANY, *Plaintiff*,
By GILBERT A. DAVIS,
OMAR POWELL, *Its Attorneys.*

In this case no question has been heard or tried by the Hon. Edgar Aldrich, district judge, but parties assenting that judgment should be entered by him in the absence of the judge who tried the case, it is so entered as follows :—

Judgment.

March 16, 1899.

And now, on this sixteenth day of March, A. D. 1899, it is considered by the court that the plaintiff recover against the defendant seven thousand one hundred and thirty-one dollars ($7131.10) and ten cents damages, and costs of suit taxed at ninety-five dollars and twentyfive cents ($95.25).

A true record. Attest :

FREMONT E. SHURTLEFF, *Clerk.*

On the twenty-seventh day of June, A. D. 1899, the defendant files the following petition for a writ of error, and assignment of errors :—

54 *Petition for Writ of Error.*

(Filed June 27, 1899.)

To the honorable the judges of the circuit court of the United States within and for the district of New Hampshire:

And now comes the defendant, The Nashua Savings Bank, and complains that in the records and proceedings and also in the rendition of judgment in a plea between the Anglo-American Land Mortgage and Agency Company, Limited, and the defendant, tried in the circuit court of the United States for said district at the May term, A. D. 1898, in which judgment was rendered against the said defendant on the sixteenth day of March, 1899, manifest error hath intervened to the great damage of the said defendant, all of which will more fully appear from the assignment of errors filed with this petition.

Wherefore it prays for the allowance of a writ of error and such other process as may cause the same to be corrected by the United States circuit court of appeals for the first circuit.

NASHUA SAVINGS BANK,
By its attorneys J. S. H. FRINK,
BATCHELDER & FAULKNER,
C. J. HAMBLETT.

Assignment of Errors.

(Filed June 27, 1899.)

Afterwards, to wit, on the twenty-seventh day of June, in the year of our Lord one thousand eight hundred and ninety nine, at the October term, A. D. 1899, of the United States circuit court of appeals for the first circuit, at Boston, Massachusetts, come the said Nashua Savings Bank, by their attorneys, and say that in the record and proceedings in the above-entitled matter there are manifest errors, as appears from this assignment of errors, namely:

1. The circuit court erred in admitting, against the seasonable objection and exception of defendant, the evidence of Herbert Ramsden, the witness called by the plaintiff, as follows:

"Int. 45. State whether or not the amount of said calls or assessments, if any, has ever been paid to the plaintiff company by said Nashua savings bank, or by any one in its behalf, or by any previous owner of such shares?

55 Ans. The amount paid on the 1,000 standing in the name of the Nashua savings bank is £2 per share. James L. Lombard paid the first £1 per share on the said shares before they were transferred by him to the defendant Nashua Savings Bank. In 1885 a call of a further £1 per share was made payable by two instalments on the 1st October and 1st December, 1885, and the Nashua savings bank paid the company on the 28th September, 1885, £500, and on the 4th December, 1885, £500 in respect of the said instal.

ments of the said call on the said 1000 shares held by them. No other payment in respect of calls on the said shares has been made by the said Nashua savings bank, or by any one on its behalf, or by any previous owner of the said shares."

2. The circuit court erred in admitting, against the seasonable objection and exception of the defendant, the statutes of Great Britain without the statutes being duly authenticated, which statutes are as follows:

"25 and 26 Victoriæ, cap. 89.

An act for the incorporation, regulation and winding up of trading companies and other associations.

6. Any seven or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of this act in respect of registration, form an incorporated company, with or without limited liability.

7. The liability of the members of a company formed under this act, may according to the memorandum of association be limited either to the amount, if any, unpaid on the shares respectively held by them, or to such amount as the members may respectively undertake by the memorandum of association to contribute to the assets of the company in the event of its being wound up.

8. Where a company is formed on the principle of having the liability of its members limited to the amount unpaid on their shares, hereinafter referred to as a company limited by shares, the memorandum of association shall contain the following things (that is to say):

(1.) The name of the proposed company with the addition of the word 'Limited' as the last word in such name:

(2.) The part of the United Kingdom, whether England, Scotland or Ireland, in which the registered office of the company is proposed to be situate:

(3.) The objects for which the proposed company is to be established:

(4.) A declaration that the liability of the members is limited:

56 (5.) The amount of the capital with which the company proposes to be registered divided into shares of a certain fixed amount subject to the following regulations:

(1.) That no subscriber shall take less than one share.

(2.) That each subscriber of the memorandum of association shall write opposite to his name the number of shares he takes.

12. Any company limited by shares may so far modify the conditions contained in its memorandum of association, if authorized to do so by its regulations as originally framed, or as altered by special resolution in manner hereinafter mentioned, as to increase its capital, by the issue of new shares of such amount as it thinks expedient, or to consolidate and divide its capital into shares of larger amount than its existing shares, or to convert its paid-up shares into

stock, but, save as aforesaid, and save as is hereinafter provided in the case of a change of name, no alteration shall be made by any company in the conditions contained in its memorandum of association.

16. The articles of association shall be printed, they shall bear the same stamp as if they were contained in a deed, and shall be signed by each subscriber in the presence of and be attested by one witness at the least, and such attestation shall be a sufficient attestation in Scotland as well as in England and Ireland. When registered they shall bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in such articles contained, a covenant on the part of himself, his heirs, executors and administrators to conform to all the regulations contained in such articles, subject to the provisions of this act; and all moneys payable by any member to the company, in pursuance of the conditions and regulations, shall be deemed to be a debt due from such member to the company, and in England and Ireland to be in the nature of a special debt.

50. Subject to the provisions of this act, and to the conditions contained in the memorandum of association, any company formed under this act may, in general meeting from time to time by passing a special resolution in manner hereinafter mentioned, alter all or any of the regulations of the company contained in the articles of association or in the table marked 'A' in the first schedule where such table is applicable to the company, or make new regulations to the exclusion of or in addition to all or any of the regulations of the company; and any regulations so made by special resolution shall be deemed to be regulations of the company of the same validity as if they had been originally contained in the articles of association, and shall be subject in like manner to be altered or modified by any subsequent special resolution.

51. A resolution passed by a company under this act shall be deemed to be special whenever a resolution has been passed
57 by a majority of not less than three-fourths of such members of the company for the time being entitled, according to the regulations of the company, to vote as may be present, in person or by proxy (in cases where by the regulations of the company proxies are allowed), at any general meeting of which notice specifying the intention to propose such resolution has been duly given, and such resolution has been confirmed by a majority of such members for the time being entitled, according to the regulations of the company, to vote as may be present in person or by proxy, at a subsequent general meeting of which notice has been duly given, and held at an interval of not less than fourteen days nor more than one month from the date of the meeting at which such resolution was first passed; at any meeting mentioned in this section, unless a poll is demanded by at least five members, a declaration of the chairman that the resolution has been carried shall be deemed conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favor of or against the same. Notice of any meet-

ing shall, for the purposes of this section, be deemed to be duly given and the meeting to be duly held, whenever such notice is given and meeting held in manner prescribed by the regulations of the company. In computing the majority under this section, when a poll has been demanded, reference shall be had to the number of votes to which each member is entitled by the regulations of the company.

67. Every company under this act shall cause minutes of all resolutions and proceedings of general meetings of the company, and of the directors or managers of the company in cases where there are directors or managers, to be duly entered in books to be from time to time provided for the purpose, and any such minute as aforesaid, if purporting to be signed by the chairman of the meeting at which such resolutions were passed or proceedings had, or by the chairman of the next succeeding meeting shall be received as evidence in all legal proceedings; and until the contrary is proved, every general meeting of the company or meeting of the directors or managers in respect of the proceedings of which minutes have been so made shall be deemed to be duly held and convened and all resolutions passed thereat or proceedings had, to have been duly passed and had, and all appointments of directors, managers or liquidators shall be deemed to be valid, and all acts done by such directors, managers or liquidators shall be valid, notwithstanding any defect that may afterwards be discovered in their appointments or qualifications."

3. The circuit court erred in admitting, against the seasonable objection and exception of the defendant, article 140 of the amended articles of association of the plaintiff corporation, which said article was introduced by the plaintiff and is as follows:

58 "140. If any member resident out of the United Kingdom neglect to give such address as is hereinbefore required, notices for him may be posted up in a conspicuous place in the registered office of the company; and for all the purposes of these regulations the registered office of the company shall be deemed to be the registered place of abode of such member."

4. The circuit court erred in admitting, against the seasonable objection and exception of the defendant, the annexed extract of the register of members of the plaintiff corporation, which extract is as follows:

Nashua Savings Bank, Nashua, New Hampshire.

Shares registered and purchased.						Capital paid.			
Date.	Register. No.	Transfer. No.	No. of shares.	Distinctive from.	Numbers. No.	Date.	No. of shares.	Per shares.	Amount.
1883. Oct. 18	.....	5	1,000	9,546	10,545	1883. Oct. 18	1,000	20%	1,000
						1885. Oct. 30	.....	10%	500
						153 Dec.— 177	.....	10%	500
									2,000

I, Frederick Herbert Ramsden, secretary of the Anglo-American Land Mortgage & Agency Company, Limited, do hereby certify that the foregoing is a true and complete extract from the original records of the company.

In further testimony whereof, the seal of the company has by order of the board been affixed hereto this tenth day of December, 1895.

F. H. RAMSDEN, *Secretary.* [L. S.]

Attest: H. RAMSDEN,

——— ———,

——— ———,

Directors.

5. The circuit court erred in denying the motion of the defendant to direct a verdict for the defendant on the pleadings and evidence in the case, which motion was made upon the following grounds:

Because (1) the declaration sets up an action in case, when it should have been in debt.

Because (2) the plaintiff is an alien corporation and the declaration contains no averment or allegation as to the law of Great Britain under which it is claimed said corporation was organized.

Because (3) the declaration contains no averment or allegation of any law of England or Great Britain authorizing the plaintiff to make the call or assessment sought to be recovered herein.

59 Because (4) the declaration contains no averment or allegation that said call or assessment was necessary to pay the debts of the plaintiff, or was made for the benefit of its creditors, and contains no averment or allegation upon what condition the plaintiff was authorized to make such calls or assessments and collect the same.

Because (5) the declaration contains no averment or allegation that any notice was ever given of such call or assessment to defendant.

Because (6) the declaration contains no averment or allegation that the defendant ever made any express promise to pay any such call or assessment.

Because (7) the declaration contains no direct averment or allegation that the payment of such call or assessment was ever demanded of defendant.

Because (8) the declaration contains no averment or allegation of the conditions or terms of the defendant's subscription to the stock of the plaintiff.

Because (9) the declaration contains no direct averment or allegation that the defendant was a stockholder in said company at the time said call or assessment was made.

Because (10) there was no evidence in the case of an express promise on the part of the defendant to pay such call or assessment.

Because (11) there was no evidence in the case that this suit was instituted or carried on for the benefit of the creditors of the plaintiff, or that this call or assessment was made for the payment of debts or other obligations of the plaintiff; and because the evidence tended to show that the plaintiff was not insolvent at the time of making the call or assessment, or at the time of the institution of this suit.

Because (12) this action to recover calls and assessments cannot, in the absence of an express promise to pay on the part of the defendant, be maintained, unless to enforce the collection of the sum due thereon for the benefit of the creditors of the plaintiff corporation, or in payment of its debts.

Because (13) this remedy, under the statute of England and Great Britain, if enforcible at all, should be in debt.

6. The circuit court erred in charging the jury, against the seasonable exception of the defendant, as follows:

"Now, under the decisions of the Supreme Court of the United States, it would be sufficient to show that this plaintiff corporation is a corporation *de facto;* and under the same decisions, the retention by the defendant of the certificate of stock for a number of years, produced at the trial by the defendant upon request of the plaintiff, might operate as an estoppel to prevent the defendant from denying that the plaintiff is a corporation—at least, a corporation *de facto.*

However, it is not necessary to pass on that question, because
60 I am sure that the plaintiff has proven the issue in its favor so clearly that I would not be authorized to submit it to the jury; and I am required, under the rule which prevails in this court, not to allow an issue to go to the jury when it is plain the court must set aside the finding of the jury, if in a certain direction. It is plain that under that practice, I am required to pass on this question, although to a certain extent it involves what may technically be called a question of fact.

* * * * * * *

Now, considering the statutes proved by the testimony of Ramsden, there is no doubt that the proceedings under the statutes which have been exhibited by the plaintiff here, constituted a corporation

as alleged by the plaintiff, not only *de facto* but *de jure*. Nothing whatever has been pointed out to indicate that the statutes of Great Britain were not in all respects strictly complied with. Therefore that issue I found for the plaintiff."

7. The circuit court erred in charging the jury, against the seasonable exception of the defendant as follows:

"Now, under the decisions of the Supreme Court of the United States, it would be sufficient to show that this plaintiff corporation is a corporation *de facto;* and, under the same decisions, the retention by the defendant of the certificate of stock for a number of years, produced at the trial by the defendant upon request of the plaintiff, might operate as an estoppel to prevent the defendant from denying that the plaintiff is a corporation—at least, a corporation *de facto*."

8. The circuit court erred in charging the jury, against the seasonable exception of the defendant, as follows:

"In meeting this issue, we first have to deal with the testimony of Ramsden, who, in the answer to the first question put to him, states that he is an English solicitor, and that he is very fully acquainted with the laws of Great Britain. His answer I need not read. It is in the record. The testimony of Ramsden not having been met or qualified or put in issue by anything which further appeared in the case, there is no doubt that I am not required to submit to the jury whether or not he is competent to give evidence of the kind which he has given. There is no doubt that, if the jury should find that he is not competent, I should be compelled to set aside the finding. He is clearly inside of the practical rule applied in *Hall v. Costello*, 48 N. H. 176. So, as already said, I would not be justified in submitting the issue to the jury under these circumstances. I am not compelled to find that he is competent as a barrister would be competent, or that he is competent to testify to the unwritten law of England; but I do find he can testify to the extent he has
61 testified—that is to say, that he is competent to testify that the printed statutes he has produced are laws of Great Britain—at least, until there is some evidence to meet his testimony or qualify it in some way. I think I am fully within the rule in that particular laid down by the supreme court of this State in *Hall v. Costello* already referred to, and which on this question, it being a question of the introduction of evidence as a mere matter of proceeding and as a mere rule of practice, controls me, although, except for that decision, I should be compelled to find that the statutes of Great Britain could not be proved in the way the plaintiff has undertaken to prove them."

9. The circuit court erred in charging the jury against the seasonable exception of the defendant, as follows:

"The next question in logical order is as to the law of the place which governs the relations of the parties to the alleged implied or expressed contract upon which this suit is brought. The cases to which I refer, namely, *Canada Southern R. R. v. Gebhard*, 109 U. S. 537, and *Hawkins v. Glenn*, 131 U. S. 329, leave this question in no doubt whatever, even if I had any doubt independently of

them. The most striking illustration of this rule is *Relfe v. Rundle*, 103 U. S. 222, 226, wherein, among other things it was said: 'Every corporation necessarily carries its charter wherever it goes, for that is the law of its existence.'

The *habitat* of the plaintiff corporation is London, and the parties by their own free act have submitted themselves to the laws of Great Britain with reference to their mutual relations, and to all the acts of the corporation done at its domicile which are consistent with those laws. Therefore, I must be governed by the laws of Great Britain, so far as they are shown in the case; and, so far as they are not shown in the case, I must presume them to be the fundamental principles of the common law, with reference to which the Federal courts are governed by their own rules, and do not accept the decisions of the local courts, except so far as those decisions approve themselves to their judgment. In other words, to state the matter accurately, in so far as the laws of Great Britain are not proved, I am undoubtedly bound to assume that they are the same as the laws of New Hampshire, where this court is sitting; but, as to the laws of New Hampshire, with reference to a question of a general character, we are not controlled by the decisions of the courts of New Hampshire, except as they commend themselves to our own judgment. Decisions of the courts are, at the most, only evidence of what the law is, and, when decisions are so conflicting as they now are, they are sometimes very slight evidence."

10. The circuit court erred in charging the jury, against the seasonable exception of the defendant, as follows:

62 "In so far as the laws of Great Britain are not proved, I am undoubtedly bound to assume that they are the same as the laws of New Hampshire, where this court is sitting."

11. The circuit court erred in charging the jury, against the seasonable exception of the defendant, as follows:

"The *habitat* of the plaintiff corporation is London, and the parties by their own free act have submitted themselves to the laws of Great Britain with reference to their mutual relations and to all the acts of the corporation done at its domicile which are consistent with those laws. Therefore, I must be governed by the laws of Great Britain so far as they are shown in the case; and, so far as they are not shown in the case, I must presume them to be the fundamental principles of the common law with reference to which the Federal courts are governed by their own rules, and do not accept the decisions of the local courts except so far as those decisions approve themselves to their judgment. In other words, to state the matter accurately, in so far as the laws of Great Britain are not proved, I am undoubtedly bound to assume that they are the same as the laws of New Hampshire, where this court is sitting; but, as to the laws of New Hampshire, with reference to a question of a general character, we are not controlled by the decisions of the courts of New Hampshire, except as they commend themselves to our own judgment. Decisions of the courts are, at the most, only evidence of what the law is; and, when decisions are so conflicting as they now are, they are sometimes very slight evidence."

12. The circuit court erred in charging the jury, against the seasonable exception of the defendant, as follows:

"We have left, then, the decisions of the three courts in Maine, New Hampshire and Massachusetts. And in these three States it must be conceded by the plaintiff that the law is settled beyond all doubt—without undertaking to distinguish the peculiar facts in each case—it is the settled law, so far as the courts can settle it, that this action could not be maintained except for an expression in the statutes of Great Britain, to which I will call attention later, and which expression would perhaps be sufficient to save it. Those decisions are declared in Cook on Stockholders, 3d ed. sec. 71, and Morawetz, 2d ed. sec. 128 and sequence, to be contrary to the great weight of authority, and I have no doubt they are so, and are contrary to principle. They seem to have grown out of some early decisions in Massachusetts, the precise nature of which I have not had time to investigate, and have not found it necessary to investigate. I think that, possibly, in these early decisions, too much weight was given to the provisions of the statutes which were
63 enacted in all three States, providing for the forfeiture and sale of stock for unpaid assessments. However, it is clear to my mind, that this doctrine is contrary to the ordinary principle of law.

* * * * * * *

Now as to the statutes of Great Britain, which under the circumstances, and under the authorities I have referred to govern the contract between the parties, section 16 of the companies' act, Exhibit 1, provides that 'all monies payable by any member of the company, in pursuance of the conditions or regulations of the company, or any such conditions or regulations, shall be deemed to be a debt due from such member to the company and in England and Ireland to be in the nature of a specialty debt.'

* * * * * * *

The fact that this provision of the statutes to which I have referred existed, and that there are also in the same statute certain provisions for the forfeiture of stock in case of non-payment of assessments, sets aside this case entirely from all those where the courts have been inclined to hold that the granting of a right to forfeit and sell stock is by implication exclusive. That is to say, there is a class of cases where the courts justly hold that, even if at common law there would be an implied promise to pay, yet where the statute provides forfeiture and sale, that remedy is exclusive. But when the statute provides both forfeiture and sale, and that the assessment when called for shall stand as a debt—when the two are found in the same statute, the correct rules of construction require they should both be considered as concurrent remedies; although the court would also be compelled to hold that, if the parties plaintiff elected to proceed by forfeiture and sale, they could not afterwards proceed by an action, or, if by action, that they could not afterwards proceed by forfeiture and sale."

13. The circuit court erred in charging the jury, against the seasonable exception of the defendant, as follows:

"We have left, then, the decisions of the three courts in Maine, New Hampshire and Massachusetts. And in these three States it must be conceded by the plaintiff that the law is settled beyond all doubt—without undertaking to distinguish the peculiar facts in each case—it is the settled law, so far as the courts can settle it, and this action could not be maintained except for an expression in the statutes of Great Britain to which I will call attention later, and which expression would, perhaps, be sufficient to save it.

* * * * * * *

However, it is clear in my mind that this doctrine is contrary to the ordinary principle of law, which in this case is this,—the delivery to and receipt by the defendant of 1,000 shares of the stock of the plaintiff corporation, such stock not being paid for, is like the
64 delivery of any other property from one person to another where the circumstances do not imply a gratuity. The law is well settled that, wherever property of value is delivered from A. B. to C. D. under such circumstances as to show it is not a gratuity, C. D., by accepting delivery and retaining the property, impliedly promises to pay for it. This stock has not been paid for, and the defendant owes for it on fundamental principles of law; he owes for it to make payments at the times and in the instalments provided for in the articles of association. It is like the case of the delivery of other property which parties understand is to be paid for in instalments."

14. The circuit court erred in charging the jury, against the seasonable exception of the defendant as follows:

"We have left, then, only the question of the form of action. Upon that question the court has no doubt that the count relied on is sufficient, and not only sufficient, but is in the best form for a proceeding of this character, and in the form less liable to raise unnecessary questions than any other possible form.

* * * * * * *

Therefore, I am compelled to hold that this liability exists, and that the count in the case is sufficient."

15. The circuit court erred in charging the jury, against the seasonable exception of the defendant, as follows:

"As to the statutes of Great Britain, which under the circumstances, and under the authorities I have referred to, govern the contract between the parties, section 16 of the companies' act, Exhibit 1, provides that, 'all monies payable by any member of the company, in pursuance of the conditions or regulations of the company or any of such conditions or regulations, shall be deemed to be a debt due from such member to the company, and in England and Ireland to be in the nature of a specialty debt.' That, under the decisions to which I have referred, is clearly a part of the implied contract,—I might say, the express contract—between these parties. At any rate, it would be safe to say it was a part of the implied contract into which these parties entered when they became share-

holders in the corporation. So, independently of the rules of the common law, and, even if I were controlled by the local decisions of Maine, New Hampshire and Massachusetts, this case would be excepted from them, and I should find here that there was an express agreement on the part of the defendant here—not a direct contract, but arising from the relation of the parties under the legislation of Great Britain—to pay this assessment. So in any view of the case, it is impossible for me to escape the conclusion that the defendant is liable in some way for this call."

65 16. The circuit court erred in charging the jury, against the seasonable exception of the defendant, as follows:

"Now, if this case was at common law and based on common-law principles, there would be no question that this is the right form of action. Therefore, inasmuch as in my view this suit can be maintained on common-law principles, and independently of these statutes of Great Britain, to which I have referred, perhaps I have gone far enough."

17. The circuit court erred in charging the jury, against the seasonable exception of the defendant, as follows:

"It is not really maintained by the defendant that there is any evidence here that the particular call or assessment in issue has been paid. And it is of no sort of consequence, so far as this case is concerned, what happened about other calls or assessments. If the defendant had paid this call, it is for the defendant to show it, and to overcome, by some evidence, the implication arising from what appears on the certificate of stock, that a large percentage of the par value of this stock has not been paid. The burden is upon the defendant to show that this particular assessment in issue has been paid."

18. The circuit court erred in directing a verdict for the plaintiff, against the seasonable objection and exception of the defendant, because the declaration sets up an action in case, when it should have been in debt.

19. The circuit court erred in directing a verdict for the plaintiff, against the seasonable objection and exception of the defendant, because the plaintiff is an alien corporation, and the declaration contains no averment or allegation as to the law of Great Britain and England under which it is claimed said corporation was organized.

20. The circuit court erred in directing a verdict for the plaintiff, against the seasonable objection and exception of the defendant, because the declaration contains no averment or allegations of any law of England or Great Britain authorizing the plaintiff to make the call or assessment sought to be recovered herein.

21. The circuit court erred in directing a verdict for the plaintiff, against the seasonable objection and exception of the defendant, because the declaration contains no averment or allegation that said call or assessment was necessaey to pay the debts of the plain-

66 tiff or was made for the benefit of its creditors, and contains no averment or allegation upon what condition the plaintiff was authorized to make such calls or assessments and collect the same.

22. The circuit court erred in directing a verdict for the plaintiff, against the seasonable objection and exception of the defendant, because the declaration contains no averment or allegation that any notice was ever given of such call or assessment to defendant.

23. The circuit court erred in directing a verdict for the plaintiff, against the seasonable objection and exception of the defendant, because the declaration contains no averment or allegation that the defendant ever made any express promise to pay any such call or assessment.

24. The circuit court erred in directing a verdict for the plaintiff, against the seasonable objection and exception of the defendant, because the declaration contains no direct averment or allegation that the payment of such call or assessment was ever demanded of defendant.

25. The circuit court erred in directing a verdict for the plaintiff, against the seasonable objection and exception of the defendant, because the declaration contains no averment or allegation of the conditions of defendant's subscription to the stock of said plaintiff.

26. The circuit court erred in directing a verdict for the plaintiff, against the seasonable objection and exception of the defendant, because the declaration contains no direct averment or allegation that the defendant was a stockholder in said company at the time said call or assessment was made.

27. The circuit court erred in directing a verdict for the plaintiff, against the seasonable objection and exception of the defendant, because there was no evidence in the case of an express promise on the part of the defendant, to pay such call or assessment.

28. The circuit court erred in directing a verdict for the plaintiff, against the seasonable objection and exception of the defendant, because there was no evidence in the case, that this suit was instituted or carried on for the benefit of the creditors of the plaintiff, or that this call or assessment was made for the payment of debts or other obligations of the plaintiff, and because the evidence tended
67 to show that the plaintiff was not insolvent at the time of making the call or assessment, or at the time of institution of this suit.

29. The circuit court erred in directing a verdict for the plaintiff, against the seasonable objection and exception of the defendant, because this action to recover calls and assessments cannot, in the absence of an express promise to pay on the part of the defendant, be maintained, unless to enforce the collection of the sum due thereon for the benefit of the creditors of the plaintiff corporation or in payment of its debts.

30. The circuit court erred in directing a verdict for the plaintiff, against the seasonable objection and exception of the defendant, because this remedy under the statute of Great Britain, if enforced at all, should be in debt.

31. The circuit court erred in refusing to instruct the jury in accordance with the request of the defendant, which request was as follows:

"The court is requested to instruct the jury that, if any action can be maintained for the recovery of the sum due under the call and assessment sought to be enforced in this action by the plaintiff, the lien thereon must be enforced by sale and forfeiture of these shares before this action can be maintained."

NASHUA SAVINGS BANK,
By its attorneys, J. S. H. FRINK
BATCHELDER & FAULKNER,
C. J. HAMBLETT.

Bond.

(Approved July 11, 1899.)

Know all men by these presents, that we, the Nashua Savings Bank, a corporation duly established by law and doing business at Nashua in the county of Hillsborough and New Hampshire, as principal, and George W. Currier, J. H. Towles, both of said Nashua, as sureties, are held and firmly bound unto the Anglo-American Land Mortgage & Agency Company (Limited), a corporation organized and existing under the laws of the United Kingdom of Great Britain and Ireland, and having its principal office and situs in the city of London, in said kingdom, in the full and just sum of two hundred and fifty dollars, to be paid to the said Anglo-American Land
68 Mortgage & Agency Company (Limited), certain attorney, executors, administrators or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by the- presents.

Sealed with our seals and dated this 28th day of June, in the year of our Lord one thousand eight hundred and ninety-nine.

Whereas, lately at a session of the circuit court of the United States for the district of New Hampshire in a suit depending in said court, between the Anglo-American Land Mortgage & Agency Company (Limited) and the Nashua Savings Bank, judgment was rendered against the said Nashua Savings Bank, and the said Nashua Savings Bank having obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Anglo-American Land Mortgage & Agency Company (Limited), citing and admonishing it to be and appear in the United States circuit court of appeals for the first circuit, in the city of Boston, Massachusetts, on the twenty-seventh day of July next.

Now, the condition of the above obligation is such that if the said Nashua Savings Bank shall prosecute its writ of error to effect, and answer all damages and costs if it fail to make its plea good, then

the above obligation to be void, else to remain in full force and virtue.

NASHUA SAVINGS BANK, [BANK SEAL.]
By GEO. F. ANDREWS, *Treas.*
G. W. CURRIER. [SEAL.]
J. H. TOWLES. [SEAL.]

Sealed and delivered in presence of—
A. M. CARLTON to G. F. A., *Treas.*
CHAS. L. TOOMEY to G. W. C.
CHAS. M. WRIGHT to J. H. T.

Approved:
WILLIAM L. PUTNAM,
Circuit Judge.

July 11, 1899.

Clerk's Certificate.

UNITED STATES OF AMERICA, *District of New Hampshire,* } *ss:*

I, Fremont E. Shurtleff, clerk of the circuit court of the United States for the district of New Hampshire, within the first circuit, certify that the foregoing is a true copy of the record in the cause entitled,

69 ANGLO-AMERICAN LAND MORTGAGE & AGENCY COMPANY (LIMITED) *v.* NASHUA SAVINGS BANK, } No. 420, Law Docket.

in said circuit court determined the petition for writ of error, the assignment of errors, and the bond to party on writ of error, and also the original citation upon the writ of error issued in said cause, with acknowledgment of service thereon.

In testimony whereof, I hereto set my hand and affix the seal of said circuit court, at Concord, in said district, the twenty-sixth day of July, A. D. 1899.

[SEAL.] FREMONT E. SHURTLEFF, *Clerk.*

Citation on Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Anglo-American Land Mortgage and Agency Company (Limited), a corporation organized and existing under the laws of the United Kingdom of Great Britain and Ireland and having its principal office and situs in the city of London, in said Kingdom, and a citizen of said Great Britain and an alien, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the first circuit, in the city

of Boston, Massachusetts, on the twenty-seventh day of July next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of New Hampshire, wherein Nashua Savings Bank, a corporation organized under the laws of the State of New Hampshire and having its situs at Nashua, in said State of New Hampshire and district, and a citizen of said State and district, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William L. Putnam, judge of the circuit court of the United States for the district of New Hampshire this eleventh day of July, in the year of our Lord one thousand eight hundred and ninety-nine.

W. L. PUTNAM,
Circuit Judge.

70 UNITED STATES OF AMERICA, *District of New Hampshire,* } *ss:*

CONCORD, N. H., *July* 21, 1899.

I hereby accept service of the within citation on behalf of the Anglo-American Land Mortgage and Agency Company (Limited), and waive all further service.

EDWARD C. NILES,
Counsel of Anglo-American Land Mortgage and Agency Company (Limited).

71 United States Circuit Court of Appeals for the First Circuit, October Term, 1900.

NASHUA SAVINGS BANK, Defendant, Plaintiff in Error,
v.
ANGLO-AMERICAN LAND MORTGAGE AND AGENCY COMPANY, Limited, Plaintiff, Defendant in Error. } No. 303.

Error to the circuit court for the district or New Hampshire.

Before Colt, Aldrich, and Brown, JJ.

Opinion of the Court.

April 24, 1901.

BROWN, *J.:*

This writ of error is to review the rulings of the circuit court in an action of assumpsit by the Anglo-American Land Mortgage and Agency Company, Limited, a corporation of Great Britain, to recover from the Nashua savings bank, a New Hampshire corporation, a stockholder in the Anglo-American Company, unpaid assessments upon stock. A verdict was directed for the plaintiff below, now defendant in error.

The first exception requiring consideration relates to the sufficiency of proof of the statutes of Great Britain that govern the Anglo-American Company, and also provide that "all moneys payable by any member to the company in pursuance of the conditions and regulations shall be deemed to be a debt due from such member to
72 the company; and in England and Ireland to be in the nature of a specialty debt." 25 & 26 Victoria, chap. 89, sec. 16.

We are of the opinion that the statutes were sufficiently authenticated by the deposition of an English solicitor familiar with company law, and a managing director of the Anglo-American Company. He states under what laws the company was organized, referring to them by their titles; and testifies that he produces copies of the acts, and, also, that "these copies are issued by authority, being printed by Her Majesty's printer, and are as such by law receivable in evidence without further proof." We have, therefore, evidence from a competent witness, not only that the documents are copies of the laws under which the company was organized, but also evidence authenticating printed copies of these laws. The witness does not, as counsel contend, simply produce certain transcripts which he says prove themselves, but states upon his own authority that they are copies of the laws, and also by his oath authenticates the documents as official copies. This proof is ample. *Church v. Hubbart*, 2 Cranch, 238; *Ennis v. Smith*, 14 How. 426; *Hall v. Costello*, 48 N. H. 176; *Kennard v. Kennard*, 63 N. H. 303; *State v. Davis*, 69 N. H. 350; *Barrows v. Downs & Co.*, 9 R. I. 446; *The Pawashick*, 2 Low. 142. The plaintiff, therefore, clearly proved that the defendant as a stockholder voluntarily assumed such liability as is set forth in the portion of the statute we have quoted.

The majority of the court are of the opinion that, as the record does not purport to contain all the evidence, or all the material evidence, the questions whether the circuit court erred in declining the defendant's request to direct a verdict for the defendant, and whether that court erred in directing a verdict for the plaintiff, cannot be considered. *City of Providence v. Babcock*, 70 U. S. 240, 244; *Texas & Pacific R. R. Co. v. Cox*, 145 U. S. 593, 606; *Hansen v. Boyd*, 161 U. S. 397; *Yates v. United States*, 90 Fed. Rep. 57, 62.

It appears from the record that the plaintiff introduced no evidence that the plaintiff corporation was insolvent at the time
73 of making the calls or assessments sued upon, or that the call or assessment was made for the benefit of creditors or in payment of its debts; but this statement does not cover all the purposes for which calls might be made legally, and the statement that this proof was absent does not make it appear affirmatively that other and sufficient proof was not presented. It does not appear that the call was not regularly made and for proper purposes.

The objection made upon the motion to direct a verdict that the declaration contained no averment or allegation upon what conditions the plaintiff was authorized to make such calls or assessments does not raise the question of the sufficiency of proof that the call was duly made.

We are bound to assume, upon this incomplete record, that the

proofs of the regularity of this call were sufficient. The necessity for applying in this case the rule of law that regularity of proceedings in the trial court shall be assumed until the contrary appears is shown by the fact that the learned judge, in his remarks preliminary to the direction of a verdict, referred to evidence not presented here; and stated that there was no doubt that the call for the assessment was properly proven, and also that no question was made as to the regularity of the meetings of the directors.

As the majority of the court are of the opinion that we are bound to assume upon this record that due proof was made of the regularity of the corporate meetings and of the calls, we are of the opinion that the question whether we are to accord to the corporate proceedings of a foreign and alien corporation the same presumption of regularity that exists in respect to domestic corporations does not arise upon this record.

The remarks of the learned judge in directing a verdict for the plaintiff were simply explanatory of the views of fact and law that led him to take that course, and were not subject to exception. The court itself determined the issues; and the question whether it erred in so doing can be determined only upon a complete record of the evidence, or upon a record containing all material evidence. This record is not shown to be such.

74 We think that only two substantial questions are presented; the first as to the sufficiency of the proofs of the English statutes, which we have considered, and the second the question whether the company, in seeking to enforce the payment of calls, is restricted to the sale and forfeiture of the defendant's shares, in accordance with the law of New Hampshire. We are clearly of the opinion that it is not. The present action is not, strictly speaking, founded upon an English statute, but upon an obligation voluntarily assumed by the defendant as a stockholder. The English statute that became a part of the charter of the company defines the liability of the stockholder; but it is the act of the defendant in voluntarily assuming this liability by the purchase of its stock that is the basis of the present action. *Canada Southern Railroad v. Gebhard*, 109 U. S. 537; *Hawkins v. Glenn*, 131 U. S. 329; *Webster v. Upton*, 91 U. S. 69; *Relfe v. Rundle*, 103 U. S. 222, 226.

Though it appears by the articles of association that the company has a lien upon the shares of a stockholder, and may enforce such lien by sale or forfeiture, yet this is not the exclusive remedy; for, by the statute which has become a part of the articles of association and to which it has consented, the bank became liable also as for a debt. The company, therefore, has two concurrent remedies, and was strictly within its right in electing to proceed by an action at common law instead of by sale and forfeiture.

If we assume that the question of the form of action properly arises upon this record, the exceptions which relate to the form of action must be overruled, since we are of the opinion that *indebitatus assumpsit* was the proper form of action. 2 Chitty on Pleading, star p. 53; Gould on Pleading, chap. III., sec. 19; *Pullman v. Upton*, 96 U. S. 328; *Mandell v. Swan*, 154 Ill. 177.

The judgment of the circuit court is affirmed.

75 ALDRICH, *J.*, dissenting:

The plaintiff is an alien business company organized under what are known as the English companies' acts, and I disagree with my associates upon the questions as to the sufficiency of the evidence to warrant a verdict, and as to what is shown by the record, and as to presumptions of evidence below not stated in the record. In this case, at the close of all the evidence, contrary to the situation in *Hansen v. Boyd*, 161 U. S. 397, cited in the majority opinion, the defendant moved the court to direct a verdict in its favor upon the pleadings and evidence in the case, and if under such circumstances the appellate court must assume that the court below had before it sufficient evidence to justify its ruling, it can never review the question whether the evidence there was sufficient to justify a verdict for the plaintiff. Moreover it is expressly shown by the record at page 27 that "the statutes, memorandum and articles of association, certificate of stock, and Frederick H. Ramsden's testimony constitute all the evidence bearing upon the question of the plaintiff's incorporation and organization," and the record, at page 26, expressly negatives the presence of certain other proofs which I maintain were necessary and essential to plaintiff's case. So, as I view the record, it is one which purports to present all the proofs material to the question of sufficiency of evidence. The essential question here is, whether there was evidence sufficient to warrant the verdict, and upon that question we must look to the record and cannot look beyond. The motion below and the exceptions raised that question distinctly, and the case, coming here upon such exceptions based upon such a motion, called for all the evidence, and we are bound to assume that it is all here, and inquire whether, upon the evidence disclosed by the record, the verdict was warranted. I dissent upon the ground that upon the evidence below, as shown by the record, unaided by presumptions of regularity of cor-
76 porate proceedings, and presumption or intendment in favor of business necessity, there is no sufficient evidence to warrant the verdict. Aside from presumption the plaintiff's case is a mere shadow, with no evidence to show that it is anything more than a paper organization,—a mere fiction. There is no evidence to show that the corporation ever did business, that it has any debts behind it or business before it,, and coming here and bringing its suit where it is not maintained as a matter of right but upon grounds of international comity only, presumptions of corporate regularity and business necessity should not be accorded to it in order to establish or aid a recovery, but on the contrary for abundant reasons the corporation should be required to prove its case by affirmative evidence, not alone of a regular call, but of a regular organization, regular corporate proceedings, and compliance with all the requirements of the home statute, and evidence that the company has either done business and needs money to pay debts, or is a going concern and needs money for legitimate business purposes within the scope of the line expressed in the articles of association.

A careful examination of the record and observations of the court below in directing a verdict show that the learned judge disposed of this case there upon the idea that it was only necessary, to make out its case, for the plaintiff to show a formal organization, that the defendant was a shareholder, and that the particular call upon the defendant below was regular on its face; and the majority opinion of my associates proceeds upon the idea that as it does not appear that the call was not regular and for proper purposes, that the verdict should stand, and so in effect accords to the plaintiff a presumption that the corporate proceedings were regular and that the call was for proper purposes. It is from this view and the effect of it that I dissent.

I am fully persuaded that a plaintiff ought not to recover under the circumstances of this case on the meagre proofs presented. Though the share subscriptions are nearly ten years old there is no evidence that this company ever did a dollar's worth of busi-
77 ness, or intends to do a dollar's worth of business, or that shareholders other than the foreign shareholders who failed to register their address at the home office have ever been called upon, or that it is ever proposed to call upon other shareholders. Proofs as to other shareholders were treated below as entirely unnecessary to the plaintiff's case, and immaterial to the defendant's case, as will be seen by reference to assignment of error seventeen, where it was said, subject to exception: "It is of no sort of consequence, so far as this case is concerned, what happened about other calls or assessments," and the view of the court below in this respect is further illustrated by reference to page 28 of the record, where, subject to exception, it was said upon a question as to the introduction of an extract from the company records for the purpose of showing that the Nashua savings bank was a shareholder: "I will rule that, if the entire record were here, I should not allow anything read except this. This appears to be the entire record relating to this defendant." And by reference to assignment of errors six, seven and fifteen, including, of course, assignment seventeen already referred to, it will be seen that the case was treated as one in which it was only necessary for the plaintiff to show a corporation *de facto*.

Quite aside from the alien character of the situation presented, which I shall consider later on, and notwithstanding that under the English and American authorities it is necessary to an enforcement of a contract of this character that all the shareholders should be treated alike, and that the call should be regularly authorized and made, and impartial and uniform among all the subscribers (see Cook on Stockholders, sect. 113, 114 and notes; 23 Am. & Eng. Enc. Law 808 (5) and notes; Morawetz on Private Corporations, sect. 154; *Company v. Burnham et al.*, 79 Wis. 47); the question as to other calls was treated as unessential and altogether immaterial and unnecessary to the plaintiff's case.

Again, aside from the alien phase of the situation, where, as in this case, the subscription contract by fair implication contemplates a strict performance of the statutory requirements and a strict
78 compliance with the association regulations, or where, as in this case, the statute (Vic. 25, 26, cap. 89, sect. 16) makes the

proceedings and records binding under certain formalities and conditions, compliance with the statutory and association regulations becomes an implied condition precedent to liability, and performance and compliance must be shown, as to illustrate, where the capital is fixed at a certain amount, the law implies that the capital shall all be taken before the corporation can enforce a call against a single shareholder (Morawetz on Private Corporations, 2d ed., sect. 137, and authorities, *n.* 1, p. 140), or as where the charter provides that a certain amount shall be subscribed before the call, a subscription is a mere offer until the amount is subscribed, and the entire amount must be subscribed in good faith, and must not be fictitious (*id.* 141), or as where shareholders are to pay when required by a vote of the board of directors there is an implied condition precedent to liability that a regular call shall be made upon all the shareholders, and this is so even where there is no express provision in the charter or contract of subscription (*id.*, sect. 143). And this is upon the idea that the shareholders mutually agree to contribute capital when certain persons shall have made a call in a certain manner, and not before (*id.*, sect. 155); or as in an action against a shareholder to recover the amount of a call, the plaintiff must allege and prove both that the defendant is a shareholder and that all conditions precedent to his liability have been performed (*id.*, sects. 141, 158; *Central Turnpike Co. v. Valentine*, 10 Pick. 142; *Fry v. Lexington R. R. Co.*, 2 Met. (Ky.) 314, 323, 324). And this is because the agreement of the shareholder is to contribute after an authorized call has been made by properly elected agents, and until such a call has been made, a condition precedent to his liability remains unperformed. (Morawetz, sect. 150.) So, upon the same principle, where the share subscription is payable in pursuance of conditions and regulations, and where the certificate is expressly made subject, as in this case, to the articles of association and the rules and regulations of the company, performance and com-
79 pliance should be required to be shown by proper affirmative proofs rather than allowed to stand upon presumption and intendment.

That part of section 16, c. 89, Acts of Victoria 25 and 26, to which the majority opinion refers as establishing the voluntarily assumed liability of the defendant, was doubtless only intended to declare and prescribe the nature of the remedy; that is to say, that the subscription should be deemed a debt due from him, and in the nature of a specialty debt in England and Ireland, to be recovered by an appropriate action; but, however that may be, it is sufficient for my purpose to say whether it was intended to fix liability or to declare the nature of the remedy, it in express terms makes moneys payable by members "in pursuance of the conditions and regulations," thereby recognizing and expressing what is always read into such contracts whether expressed or not, that liability is incident to, and conditioned upon fulfil-ment by the other party, by compliance with statutory and associate regulations; and compliance and performance, therefore, become a substantive element of the plaintiff's case to be established by evidence. Even if the record discloses sufficient evi-

dence of the face regularity of the calls, which I deny, there is no pretension in the record, or in the majority opinion, that there was any evidence that the calls were authorized by the resolution which the statute and the articles of association contemplate, or that the calls were uniform or necessary to pay debts or to do corporate business, or that there was any evidence showing whether the corporation was going or winding up, whether this attempt to recover is for corporate purposes, or whether the detached and incomplete extracts from the record are remnants of an exploded and defunct experimental association in the hands of speculators who found them in an attic. I am not contending against shareholder contract liability, as a general proposition, but that a plaintiff should be required to show that it has done the things which the statute and the contract contemplate should be done in order to mature the liability—that the recovery should be upon substance rather than upon shadow. The corporate field of the last ten years is
80 strewn with wrecks of speculative associations, wrecks of corporations organized to do all sorts of things, all the way from making cork from wood pulp to extracting gold from the seas. Records of such corporations can be had by the finding. The back rooms of vacated offices are filled with records and debris of experimental and defunct corporations—some with records complete upon their face, and ornamented certificates of stock fair to look upon—which never started business, and others with incomplete records and partially filled subscription lists, ranging from one subscriber to ninety-nine per cent. of the whole, which have attempted business and failed; and the length of struggle for life and the time of ultimate death are variously and mysteriously marked. If a case can be made out by simply showing organization and presenting a fragmentary extract showing a single subscription, and a scrap from the records showing a single call, by a corporation which never did business and never proposes to do business, and which carries, perhaps, two or three subscriptions for shares only, the door is open to abuse, and recovery is easy and convenient for those who may hunt up and get possession of the records of wrecked and defunct corporations; but, to my mind, the corporate right of recovery upon a naked subscription contract should not be, and is not, so arbitrary, absolute and conclusive as to justify a verdict founded upon such a meagre and unsubstantial showing.

In my view, the defendant's motion for a verdict for want of evidence, and its contention against the verdict on the ground of insufficient proofs and evidence, and its exceptions to the ruling denying the first and to granting the second, sufficiently raise the question, and therefore demand consideration at the hands of this court, and the particular manner in which the question is raised is pointed out further on.

This organization is a mere business arrangement, having none of the formalities of judicial proceedings, and not all of the formalities of corporate proceedings incident to our own statutory corporations, but before entering upon a discussion of the particular ques-
81 tion as to the alien character of the plaintiff and the measure of proof to be required in a case like this, and as bearing

thereon by analogy, I desire to point out the caution with which courts receive and enforce even the solemn judgments *in personam* of courts of alien countries.

The particular question is one of substance and one of vast practical importance. It relates to the measure of proof to be required in respect to corporation or company necessities, and in respect to the regularity of corporate or company proceedings, including that of assessment calls upon stockholders in an alien country, where enforcement of alien rights is sought on grounds of international comity. And as bearing upon this question, by reason of the force of analogy, we must keep in mind the caution exercised by the courts of all countries in respect to accepting without proper proof the solemn statute laws of another and an alien country, as well as the reluctance with which the courts of the various countries have accepted as conclusive even judgments *in personam* of courts of foreign and alien countries. The opinion of the Supreme Court by Mr. Justice Gray, *Hilton v. Guyot*, 159 U. S. 113, presents an exceedingly interesting and valuable historical and judicial review of the principles of international law involved in the question as to the credit and effect to be given to judgments of foreign countries, and of the rules of comity and justice which should control their enforcement.

That case involved a judgment of a court of the French republic having general jurisdiction, which was sought to be enforced in the courts of the United States against a citizen of this country, and as a result it was treated as not entitled to the full credit which is accorded to judgments of the courts of our sister States; but upon reasoning in respect to international conditions, it was said, in effect, if it appears from the judgment that it was rendered by a competent court, having jurisdiction of the cause and of the parties, and upon due allegations and proofs and an opportunity to defend, and the proceedings are according to the course of a civilized jurisprudence and are stated in a clear and formal record, that the judgment is *prima facie* evidence at least of the truth of the matter adjudged,
and conclusive of the merits, unless special ground is shown
82 for impeaching it, or by the principles of international law, and by the comity of our own country, it is not entitled to full credit and faith. Thus it will be seen that, before the foreign judgment is accepted as *prima facie* evidence, it must appear as a substantive part of the plaintiff's case—not irregularities shown by the defendant, not want of jurisdiction and due allegations and proofs and lack of opportunity to defend shown by the defendant, or that the proceedings were not according to the course of civilized jurisprudence shown by the defendant—but it must appear in the plaintiff's case that the judgment was rendered by a competent court, and one having jurisdiction of the cause and the parties, and one founded upon due allegations and proofs and opportunity to defend, and that the proceedings are according to the course of a civilized jurisprudence, and that they are stated in a clear and formal record, and, when this is made to appear by the plaintiff, a judgment will be accepted as conclusive, unless the defendant shows

ground for impeaching it, like fraud or prejudice, or that by the principles of international law, or by the comity of our own country, it is not entitled to credit and effect. To illustrate, by taking an extreme view in respect to international comity, in France, a judgment of a foreign country sought to be enforced there is subject to an examination on its merits—*au fond*—on the view that judgments in favor of a foreigner against a Frenchman by a foreign court are subject, when execution of them is demanded in France, to the revision of the French tribunals which have the right and the duty to examine them, both as to the form and as to the merits. Of course such a rule does not obtain between this country and Great Britain, and is only referred to as showing the measure of judicial caution exercised in respect to assumptions of conclusiveness and regularity when foreign and alien situations are presented.

So it is seen that foreign judgments are received and enforced with caution. And it is a vast step from a judgment of a court of general jurisdiction founded upon notice to the adverse party and actual trial, which is to be received with caution and upon
83 certain proofs, to the binding force of proceedings of private foreign corporations or corporate companies. The contractual liability of stockholders under an English corporation or company like that in question is not like the contractual liability existing under the constitutions and statutes of our sister States, like that of Kansas, or Ohio, or Minnesota, which we are so frequently called upon to consider, for the reason that under these constitutions and statutes the liability of the stockholder resides in the express provision of the constitution or of the statute of the State, while the English statutes simply provide for the organization of the corporation or company, and authorize liability to be created by corporate or company action. In the first instance the liability results from the provisions of the constitution and the statutes, while in the second instance the liability, if its exists, is created by the acts of the parties, and under such circumstances enforceable liability can only be created by lawful and regular corporate and statutory proceedings, which must be shown, and ought not, and cannot with any measure of safety, be presumed.

When called upon to enforce against stockholders the Kansas constitutional and statutory contract, right of enforcement depends upon the judment against the corporation, and enforcement proceeds upon the idea that all of the stockholders have been concluded by the judgment based upon service upon the corporation. Under statutes like that of Ohio, we hold that enforcement by a Federal court of the constitutional liability created by a sister State is conditioned upon a joinder of all the stockholders and the corporation, and proof that the contemplated statutory ascertainments have been made; and under statutes like that of Minnesota, enforcement is upon condition that the statutory and equitable requirements have all been complied with. And there is, as it seems to me, and as has been observed, a wide difference between an express constitutional or statutory provision which creates a liability from the stockholder to

the creditor, and a permissive business arrangement under the statutes of Great Britain where the liability is to be created by corporate vote or regulation.

84 The acts referred to in the record are various acts of Victoria, and among them is an act for the incorporation, regulation and winding up of trading companies and other associations, with amendments; another, an act to amend the companies' acts; others, in respect to banking associations. But the plaintiff company was organized under the companies' acts. These acts provide that certain persons may associate themselves together for a lawful purpose, that the liability of the members may be limited to the amount unpaid on the shares, or to such amount as the members may respectively undertake by the memorandum of association to contribute to the assets of the company in the event of its being wound up; and in case the company is formed on the principle of having the liability of its members limited to the amount unpaid on the shares, that various things shall be done, and registered, and among other things to be stated and registered is the object for which the proposed company is established. It also provides that certain modifications of the conditions may subsequently be made; it provides that the articles of association shall be printed, and, when certain other things shall be done, that the articles shall be registered, and that when these statutorily required things are done, that the articles shall be binding upon each member of the company, and that all moneys payable by members shall be deemed a debt due from such member to the company, and in England and Ireland to be in the nature of a specialty debt. It provides for passing special resolutions, by a majority of not less than three-fourths of the members, under certain and various conditions.

The memorandum of association in question describes the purposes of the enterprise and various other things, and in an amended article, it is provided that the directors may from time to time make such call as they may think fit upon the members in respect of all moneys unpaid on their shares. But it is understood from paragraph ten of the amended articles that the calls are to be authorized by resolutions of the directors, or of the association. The articles

85 also provide that the number of directors shall not be less than three nor more than ten; that each director shall own fifty shares at least in the company, and that the office shall be vacant if he ceases to own, in his own right, at least fifty shares, or if he hold any other office or place of profit under the company, or if he be absent from the meeting, as provided under the articles; or if he be adjudged bankrupt, or if he suffers his estate to be vested in any person for the benefit of his creditors, or compounds with his creditors, or suspends payment; or if he is individually concerned in or participates in the profits of the company, or if he participates in the profits of any work done by the company.

It is also provided by the articles of association that the directors shall cause minutes of various things to be made in books provided for the purpose, and among other things of all orders made by the

directors and committees of directors, and of all resolutions and proceedings of meetings of the company.

And, by the express terms of the defendant's certificate of stock, the holder's rights are made subject to the articles of association and the rules and regulations of the company.

The pleadings in this case, among other things, put in issue the question whether the corporation was ever duly organized, whether all the shares necessary to enable the corporation to be duly and regularly organized have been subscribed to, and among other things the defendant in its pleadings set out that "the assessments attempted to be collected in this suit are invalid, unlawful and unauthorized."

It appears from the record, page 26, that the plaintiff introduced no evidence whatever that the plaintiff corporation was insolvent at the time of making the calls or assessments sued for, or at the time of the bringing of this suit, or that the call or assessment was made for the benefit of its creditors or in payment of its debts.

The fifth assignment of error, under paragraph four, is upon the ground that the declaration contains no averment or allegation that the call or assessment was necessary to pay the debts of the company, or was made for the benefit of its creditors, and that it contains no averment or allegation upon what condition the plaintiff was authorized to make such calls or assessments and to col-
86 lect the same. So it appears that there was no allegation as to the financial condition or financial necessities of the corporation, and no evidence of its insolvency, or of the necessity for a call for actual business purposes, and that there was no evidence that the various conditions and restrictions contained in the various statutes and in the various articles of association had been complied with; and that there was no allegation or proof whether the company was engaged in business or had ceased to do business, or that the call was made upon all the members of the company alike.

The fifth general assignment of error is that the court erred in denying the motion of the defendant to direct a verdict for the defendant on the pleadings and evidence in the case.

The nineteenth assignment goes to error in directing a verdict for the plaintiff. Various grounds are stated, and, among others, that in assignment twenty-eight, which goes upon the ground that there was no evidence in the case that this suit was instituted and carried on for the benefit of the creditors of the plaintiff, or that this call or assessment was made for the payment of debts or other obligations of the plaintiff; and under assignment twenty-nine, that, in the absence of express promise to pay on the part of the defendant, the action cannot be maintained unless to enforce the collection of the sum due for the benefit of the creditors of the plaintiff corporation, or in payment of its debts.

It is true the particular question as to the difference in the rule as to measure of proof applied to domestic corporations and that to be applied to foreign or alien corporations was not expressly called to the attention of the court below. But it seems to me although the question of distinction between foreign and domestic corpora-

tions was not expressly urged *in extenso* to that court, that it was sufficiently covered by the brief statement, the motion for a verdict for the defendant and the grounds stated in support thereof, and the exceptions to the order directing a verdict for the plaintiff and the grounds there stated; and that the assignments of error entitle counsel to urge it here for our consideration and that we ought therefore to deal with it.

87 Assignment twenty-nine is upon the distinct ground that there was no evidence that this suit was instituted and carried on for the benefit of creditors, or that the call or assessment was made for the payment of debts or other obligations of the plaintiff. The exception on which this assignment is based, under a familiar rule, called for all the evidence on that point, yet the record does not disclose any evidence whatever on the subject. While this assignment expressly raises a particular question, by fair and reasonable inference it also raises the question whether the corporation is a going corporation or is winding up, and, if winding up, whether the money was needed to pay legitimate debts of a corporation, whether there were any debts, or whether the money was going into the pockets of whoever succeeded in recovering upon the naked assessment. Aside from intendment and assumption, there is nothing tending to establish which way it is. There is no evidence that the corporation was out of business, or that it was doing business.

Under our own system of territorial and State divisions, there is no imperative and absolute rule of right, among the States, aside from that involved in the provision of the Constitution of the United States as to judgments of sister States, by which actions at law are maintained extraterritorially to enforce rights involved in corporate or other conditions existing in jurisdictions foreign to the *forum* where aid is sought. Such aid is, however, usually rendered on grounds of public policy, comity and justice, and so, in respect to international conditions involving alien corporations enforcement does not exist as a matter of right, but on the ground of wholesome international comity.

It is claimed by this company that the right of recovery does not stand here like that of a right involved in a judgment; that is to say, a judgment concludes because the defendant has been notified and his rights adjudicated, while in this case it is insisted that the right rests in contract, and that the stockholder is concluded by corporate or directorship action, upon the ground of representation,—

88 upon the ground that his rights were represented by the corporation, and that the directors and other members with whom he was associated were his agents for such purpose. I recognize this distinction between contracts and judgments, but upon rules of analogy I say, if the plaintiff, in order to secure an enforcement of his judgment, under alien conditions must prove the solemn laws of an alien country, and show due allegations and proofs, and due proceedings in the usual course of civilized jurisprudence, and formal records of courts of foreign countries of general jurisdiction, and that the merits of the judgment controversy were not extrajudicial, that there are far weightier reasons for requiring

the same measure of proof and security in respect to the corporate management of the affairs of alien corporations and their proceedings; in other words, as a condition of enforcement an alien corporation may be required to make full proof of the regularity of its proceedings according to the domiciliary law; that its calls were in the regular course of its business, and that the money called for was for the purpose of carrying on the business contemplated by the articles of association, or necessary to pay the debts of the association if the corporation was insolvent and not going; that the calls were duly made upon all the stockholders alike, with no discrimination in favor of domiciliary stockholders or against foreign stockholders; and that the necessity existed in respect to business done within the scope of the contemplated purposes of the association.

It is true the limitations upon the doctrine of corporate representation of stockholder interests as applied to distant alien countries have never been defined or much discussed, so far as can be learned; but I think under alien conditions, even if the relations are that of principal and agent, or if the parties were associated together for a general purpose, and if the doctrine of representation applies, that it is not unreasonable in a case of this kind, where relief is sought in a country foreign to the corporation, to require the plaintiff suitor to show that the corporate agent acted altogether within the scope of the authority. I do not view this as one presenting the purchase of a certain number of shares of a certain par value, but as a subscription
89 to shares upon which calls or assessments may be made as necessities occur, and, as the shares are expressly subject to the articles of association and to the rules and regulations of the company, and by implication to the law of the domicile, it is not, unreasonable to require the corporation to show that its assessments, its necessities and proceedings, are altogether within such scope. On the contrary it is quite reasonable, and justice and safety require, that the party seeking enforcement shall show that all the conditions contemplated by the domiciliary law and the articles of association have been complied with.

I do not think comity or justice require that we should accord to corporate proceedings of a foreign and alien corporation the presumption of regularity which exists in respect to domestic corporations, or that the doctrine as to the representative character of the corporation should, without limit, be extended to distant alien corporate action of business companies formed under general statutory laws of foreign countries, and that foreign corporate action should be accepted as conclusive of the rights of the parties. The power of the corporation to represent the stockholder depends upon the scope of the agency, and the scope of the agency depends upon the statute, the articles of association, and the character of the business; and the fact that proper corporate and statutory conditions exist should be shown by the plaintiff. While certain assumptions may be safely made with respect to domestic corporations, and while certain conclusions may be safely drawn from domestic representative situations, and certain presumptions safely accorded in respect to

domestic corporate regularity and necessity, under circumstances such as involved in this case no principle of international comity is violated by requiring the contractual corporate and statutory facts to be shown by the foreign suitor seeking aid in a country alien to the domicile of the corporation. It is the policy of the law in some cases to place the burden of proof upon a party when the facts are peculiarly within his knowledge, and not within the knowledge of the other party. Greenleaf on Evidence, vol. 1, § 79; *id.*,
90 §§ 32, 34, 79. Rules as to burden of proof, and as to presumptions, are rules of convenience based on expediency and adopted from motives of public policy. Questions as to such rules do not involve matter of substantive right but relate rather and only to conduct of trials, rules of evidence and the measure of proof to be required. Under alien corporate and statutory conditions such as here presented, considerations of convenience, expediency and public policy require that the foreign suitor's case shall not be made out by presumption or intendment, or by operation of technical domiciliary rules as to burden of proof, yet doubtless where representative capacity is created and is shown to continue, right of enforcement would not be affected by alien conditions, and doubtless the subscription creates the representative relation; but under alien conditions, as already said, assumption and intendment should not be invoked to establish the fact that the relation continues—in other words, that the proceedings, business and conditions of the corporation continue to be such as to entitle it to bind the stockholder upon grounds of representation, and a foreign corporation relying upon the alleged or supposed representative capacity, may and should be required to show that it has proceeded within the scope of the authority and within the contemplated agency.

Moreover, as has been said, the English statute does not create the right, it simply permits an association to organize for a purpose; and a corporation which undertakes to enforce the supposed right in a foreign country should be required to make full proof that the right is founded upon the contemplated authorized conditions, upon regularity of non-discriminating proceedings, and the necessities of the business. It does not follow, because upon proper pleadings between resident suitors the burden of showing the absence of these things may be placed upon the defendant, that a foreign plaintiff, who asks that a supposed foreign right shall be enforced in a country alien to the right, should not be required to make full proof in respect to regularity of proceedings and the necessities for a corporate call. It has been recently held here, as has been said, that a stockholder liability, created by an express constitutional provision of a sister State, will not be enforced against the stockholder, unless it affirmatively appears that all
91 things which the statute contemplated should be done, have been done. Equitable and legal considerations require that a foreign corporation shall make the same full showing. This is no special hardship upon the alien plaintiff, and it affords only a reasonable measure of security to a defendant stockholder foreign to the domicile of the corporation. If the attorney of an English cor-

poration may make out his case by producing the statutes and the articles of association, and a piece of paper with six lines showing an assessment call, without being required to show regularity of proceedings, or that the assessment call was uniform and in respect to transactions not *ultra vires*, or that the money was needed to carry on the going business, or to pay the debts of a business that is being closed out, such assessment calls must become the foundation for enforcement, if they come from corporations operating under English statutes in the remote colonies of the British Empire, or from France, or Italy, the late Republic of South Africa, or from Kamchatka or Japan.

Of course this view is quite aside from intendment made in favor of domestic corporations like that suggested in *Webster v. Upton, assignee*, 91 U. S. 65; *Chubb v. Upton*, 95 U. S. 665; *Telegraph Co. v. Purdy*, 162 U. S. 329, 336. Such cases go upon the idea that the contract is to pay the full par value of the authorized stock when required and when called, and certain intendments as to corporate conditions are made on the ground that the call concludes certain questions. Such intendments or presumptions are based upon matters of domestic concern and result from domestic conditions and peculiar interstate relations and necessities; but it must be said that these cases contain no hint or suggestion that presumption or intendment of due regularity or that the idea of conclusiveness should be extended to foreign private corporate or company action. Under our peculiar conditions of territorial divisions and our peculiar quasi-interstate judicial system certain intendments and presumptions as to corporate existence and corporate regularity may not stop at State lines, but should such presumptions and in-
92 tendments as to corporate conditions extend beyond national lines or the lines of realms, and to private corporations organized under foreign statutory laws and doing business in distant and alien countries?

I do not think international comity, public policy or justice, require us to make such intendments or presumptions in favor of an alien corporation. And my contention in this respect is rested upon the ground that the same intendments and presumptions should not be accorded to corporations of distant alien countries that are accorded to corporate institutions of our own creation which are directly responsible to the local domestic legislatures creating them, and subject to the restraints of the domiciliary courts.

The record in this case does not even show the statutorily contemplated and intended resolution of the company or of the directors as the foundation for the call; or any special resolution conforming to the provisions of the statute. So far as this record shows, there are many provisions of the statutes and of the regulations of the company which may not have been complied with, and indeed, while a call must be for the *bona fide* purpose of raising money for corporate purposes, and while it must be impartial and uniform among all the subscribers or shareholders and made on all alike (Cook on Stockholders, §§ 113, 114), aside from presumption and intendment, for aught that appears in the record this company may

be out of business, the money may be intended for *ultra vires* purposes, and this assessment call may be upon this defendant only, or at most upon the non-resident stockholders only, of all the shareholders. Thus the plaintiff presents a naked assessment call of a private corporation of a foreign and alien country, without proof of necessity or of *intra vires* purposes, or that all of the shareholders have either paid or been called upon to pay. While the shareholder liability in this company is not upon express condition that the shareholders shall bear the company burdens equally, or that these things shall be made to appear, it *is* expressly subject to the regulations of the company, and, by force of operative construction, to the law of the foreign land. And a court called upon to
93 enforce the supposed right against its own citizens may well require, as a condition upon which the supposed alien right founded in foreign statutory and corporate conditions will be enforced, that conditions shall be shown to exist which justify and make the call necessary; that there is no discrimination in favor of the shareholders of the domicile of the corporation, or against those foreign to the domicile; that the intended use of money called for is within the general scope of the business originally contemplated or subsequently legally authorized, or to pay debts accruing in respect to the authorized business of the association; and that the corporate proceedings are regular, and in accordance with all the regulations and by-laws of the corporation and all the provisions of the foreign statutes, and all the requirements of the foreign common law. It is not unreasonable to require a foreign suitor who seeks enforcement of a foreign right to show that his right is fully and fairly within the purview of the foreign law and within the scope and the necessities of the foreign enterprise. Such a rule would not impose so great a hardship upon the foreign corporate suitor who seeks the relief, and who has all the records and all the necessary evidence at hand, as we should impose upon our own citizens by subjecting them to recovery upon the naked proof of an assessment call by a private foreign corporation, or, as the only alternative, compel them to go to a foreign country and show that the corporation was not within the law, that the proceedings were not regular, and that the business and the assessment purposes were *ultra vires*.

At the arguments we called the attention of counsel directly to the question whether, under the jurisprudence of England, conclusiveness is accorded to corporate action involving internal management of corporations created by and doing business in countries foreign to England. No satisfactory answer was given in the subsequent brief on this point, and I should doubt whether English courts would enforce stockholder liability upon the naked evidence of a single assessment call certified by the secretary of a private business corporation organized under our statutes and operat-
94 ing either in our new and distant possessions or in our important business centres. Some English authorities were cited, based upon cases arising from the colonies of Great Britain, but none as to judicial treatment of American private corporation assessment calls in the courts of England.

I do not feel called upon to enter upon a discussion of the English cases, or to inquire whether this action, with the measure of proofs here presented is sufficiently within the English authorities to be maintained there, for the reason that the rule of evidence and the measure of proof required in the domestic *forum* may not be a just rule of evidence or of a sufficient measure of proof in the courts of an alien country where enforcement of such right is sought. But without venturing upon a critical analysis of the English cases, it may be observed that it is at least extremely doubtful whether the English courts would consider the proofs here presented sufficient to establish the right of recovery in the domiciliary courts in a case like this. In some of the English cases based upon some of the statutes of Great Britain, it is held that organization and subscription of the full stock must be shown; in others, that the assessment was upon all the shareholders alike; in others, that under certain circumstances the liability on the shares does not constitute a debt; in another, under the Swansea dock act, where the place of business was Swansea, and fourteen days' notice of all public meetings was required by the statute to be given by advertisement in a paper circulating in the district of the company's principal place of businesss, notice was published in a Sunday London paper, and, at a meeting held in pursuance of the notice, change was made in the number of directors, it was held to be invalid and illegal because it did not appear that the paper reached Swansea; in others, that there must be properly appointed directors to make a call; in others, that the form of remedy must be strictly followed, and English authorities would seem to indicate, where no particular form was prescribed, that the remedy, as well as the question whether such courts would require evidence as to the internal management of the corporation, might depend upon the question whether the concern was a
95 going concern, or in process of winding up; in other cases, that it must be made to appear that the requisite number of directors acted; in others, under certain circumstances, that it must be made to appear that there are debts of the company unpaid. I do not refer to these cases as having any decisive bearing upon any particular point before us, but merely as illustrating that in England, under certain circumstances, something more than organization, holding and assessment is required to be shown.

It is now a matter of common notoriety that the evils resulting from loose and unauthorized conduct and management under these English companies' acts are a matter of severe popular, parliamentary, and judicial criticism in England; and that in 1894 a committee was created by a London board of trade, which was presided over by Lord Davey. This committee in its report pointed out many of the evils incident to the system; and some of the principal evils were said to result from directors acting without qualification, or taking gifts of paid-up shares; from companies proceeding to allotment upon insufficient capital, from loading of the purchase-money in case of a company formed to purchase an existing business, or of the contract price in case of a company formed to construct and work an undertaking; from the non-disclosure in the

prospectus of facts material for the guidance of intending investors, and want of facilities on the part of the public for ascertaining the existence of mortgages and charges affecting the company's property. This committee reported an act intended to remedy notable and notorious evils, which became a law in 1900 (W. N., August, 1900, 188, 189; 38 L. R. 96, statutes 63 and 64 Vic.), and in it, among other things, the idea of conclusiveness is dealt with, and conclusiveness is only expressly carried to the certificate of incorporation, and to registration and matters precedent and incidental thereto, thus, by implication at least, presupposing a limitation upon the uncertain and unsafe doctrine of presumption and conclusiveness, if the doctrine may be said to exist, in respect to regularity of corporate and company proceedings subsequent to incorpora-
96 tion and registration. I do not refer to recent English parliamentary criticism and having a decisive or even a direct bearing upon the question at issue, but to illustrate the point taken that we cannot with safety blindly accept as conclusive detached extracts from such business associations.

It was held by Mr. Justice Kekewich, in *National Debenture and Assets Corporation* (1891), 2 Ch. 505, that the certificate of incorporation could not be treated as conclusive of the fact that the statutory seven persons had signed the memorandum of association, and the court of appeals expressly agreed with Mr. Justice Kekewich's view of the law, Lord Justice Lindley stating that it was a condition precedent to registration under the act that the company should consist of seven members. Reasoning from such English requirements, it may at least be required here, as a condition of enforcement in this *forum*, that the plaintiff shall not only show a legal statutory organization, but that the proceedings have been regularly within the English statutes and the by-laws of the company, and in short, that the status of the corporation and its proceedings are in all respects within the law of England.

Bailey v. Burkenhead, 12 Beav. 433, 440, which the plaintiff cites in support of his position as to the reluctance of the English courts to inquire into the internal affairs of corporations, was the case of a going corporation and was a bill in equity without a proper joinder of the different classes of shareholders; still, because the English courts do not inquire into the internal affairs of going domestic corporations in a suit in favor of a stockholder, it does not follow that courts of a country alien to the corporation should be estopped from requiring proof upon the question whether the corporation is going or not, and, if not going, require evidence as to the corporate necessities.

However it may have been before, since the decision of the Supreme Court in *Concord First National Bank v. Hawkins*, 174 U. S. 364, a banking corporation is not estopped from setting up in avoidance of an assessment that its holdings are *ultra*
97 *vires*. If this may be done by a corporation in its own behalf, I see no reason why the stockholder may not set it up as against the corporation, especially in respect to matters of which he had no notice. If this may become a defence between domestic

shareholders, or corporate suitors, and if a foreign plaintiff may be required to make it appear that his foreign judgment of a court of general jurisdiction is founded upon due allegations and proofs, that its recovery was in accordance with the usual course of jurisprudence of a civilized country, and that the merits of the case were not extrajudicial, I see no reason why enforcement of a private foreign corporate assessment call, against a citizen shareholder of this country, by the courts of this country, may not without offending the principles of international comity, be made subject to the qualification that corporate regularity and full *intra vires* conditions shall be shown by the foreign suitor invoking the aid.

This is, as claimed, a contract, but it is not a simple contract like that of a contract of sale, or like that involved in a negotiable promissory note; on the contrary, it is a contract involving foreign corporate conditions and foreign statutory requirements, and enforcement being sought *extra regnum*, on grounds of comity, regularity or corporate proceedings and performance of statutory requirements by the party who sets up the contract should not be presumed, but should be shown by the party seeking its enforcement.

The general rule of comity, as to enforcement of the personal liability of a resident stockholder of a foreign corporation, is, that if it rests in contract merely, it will be enforced according to the law of the place of the contract, and if it grows out of a statute to which the corporation belongs, that it will generally be conceded and enforced, if the liability is in its nature contractual; but this is wholly upon grounds of comity, and may be altogether excluded, or enforced in a foreign country upon such terms and conditions as that country may think proper to impose. And this qualification is true even in respect to our sisterhood of States: *Paul v. Virginia*, 8 Wall. 98 168, 181; *Pembina Mining Co. v. Pennsylvania*, 125 U. S. 181; *Boston Investment Co. v. Boston*, 158 Mass. 461; *Fawcett v. Iron Hall*, 64 Conn. 170; 29 Atl. 614; *Pennsylvania Co. for Ins. on Lives v. Bauerle*, 143 Ill., 459; *People v. Pavey*, 151 Ill., 101; 37 N. E. 691; *Home Ins. Co. v. Davis*, 29 Mich., 238; *W. U. Tel. Co. v. Mayer*, 28 Ohio St. 521; *State v. Ackerman*, (Ohio Sup.), 37 N. E. 828.

Therefore, it is no answer to my position as to the measure of proof to be required, to say that holding the stock creates a contract. I concede that it is in the nature of a contract. But saying that this is a contract is no greater answer than saying, in case of a foreign judgment, that the plaintiff's right of recovery is founded on a judgment of a court of general jurisdiction, and the enforcement of such a foreign and alien right is safeguarded by requiring a judgment plaintiff to show something more than naked judgment. And so the enforcement of a supposed foreign corporate contract right may and should be safeguarded by requiring something more than the naked holding and assessment. While under the Federal Constitution judgments of our sister States are entitled to full credit, and, duly authenticated, prove themselves by their own weight and create an enforceable liability, judgments of alien countries, duly authenticated, do not prove themselves by their own weight and establish an absolute and enforceable liability, but require extrinsic

explanation and support to that end. And by parity of reasoning and by force of close and almost controlling analogy, while assessments by domestic corporations under certain exceptional circumstances, and upon somewhat exceptional grounds, create an enforceable liability, assessments by foreign and alien corporations do not, necessarily, by force of an absolute and arbitrary rule create enforceable liability without extrinsic explanation and support.

The proceedings of a private foreign corporation without the semblance of a seal, or even with a seal, *must* stand upon less favorable ground *extra regnum*, both as to measure and burden of proof and as to conclusiveness, than the solemn and formal judg-
99 ments of courts of general jurisdiction of foreign and alien countries. And questions as to the regularity and necessity of corporate assessments, and other material questions as to corporate proceedings, must stand less favorably as to presumption and intendment than the question of the authenticity of the solemn published statutes of Great Britain. So in this sense, private foreign corporate assessment proceedings and the transactions involved in the anterior corporate proceedings, do not possess any peculiar measure of merit, sanctity or solemnity, as evidence, above that possessed by the judgments of foreign courts of general jurisdiction, and there is no peculiar rule of conclusiveness applicable to private foreign corporate assessment rights not applicable to foreign judgment rights. Indeed, judgment rights are recognized as in the class of the highest and most solemn of rights, and if proofs may be required as to the regularity of foreign judgments we see no reason why this plaintiff, a foreign corporation, should not be put to full proof of corporate necessity, corporate regularity as to its proceedings, and to full proof as to the transactions being within the scope of the business originally contemplated by the association, or subsequently legally authorized.

And my conclusion is that the ordinary rules applying to domestic corporations as to burden and measure of proof do not apply to an alien corporation of the character of the one in question, and that the rule to be applied to alien corporate contracts should require the plaintiff to show that all material statutory and corporate requirements have been complied with, and that the conditions contemplated by the statutes and the common law of the country of the corporation actually exist. It is also my conclusion that under the rule as to the measure of proof which should be required in the courts of a country alien to the corporate domicile, that the pleadings in this case, together with the motion for a verdict, and the statement of the grounds thereof appearing in the record, operated to put the plaintiff to a larger measure of proof than was produced in its behalf at the trial, and that the objections and the exceptions sufficiently present to us the question as to the measure of
100 proof to be required in a case like this. This is not a denial of right; it is not a denial of remedy; it is only a denial of the right of relief until the foreign suitor asking relief proves by evidence readily accessible to him, and not accessible to his adversary,

that the right exists and is founded in conditions which fairly and reasonably require its enforcement.

When, however, a foreign plaintiff like the one in question presents a case with a measure of proof showing that justice and comity require its enforcement (and in this connection comity is used in a sense as broad as that of justice), the right should be established and enforced in accordance with the law of England, and the remedy, subject to certain limitations, should be that employed for such purpose in that country, and this is for the reason, as said in *Railway Co. v. Gebhard*, 109 U. S. 537, that "a corporation must dwell in the place of its creation and cannot migrate to another sovereignty * * * and whatever control it is subject to at home must be recognized and submitted to by those who deal with its elsewhere." Such being the law, it follows that "every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government affecting the affairs and obligations of the corporation * * * as the known and established policy of that government authorizes."

Considerable was said upon argument against the remedy, but upon the question of the remedy, were the right established by proper proofs, I agree with my brethren. The decisions are numerous and controlling, that, if the statute creating the liability specifies a remedy, that remedy must be followed; but, if not specified, I think the right must be enforced according to the usual course of jurisprudence in the jurisdiction of the corporation. This has been repeatedly held in respect to assessment cases in our own country, and I see no reason why the same rule should not apply to English corporations, especially in view of the fact that the system of common law and equity jurisprudence of England prevails in this country so far as the same is not repugnant to our institutions. In this view the law of New Hampshire in respect to the sole remedy of forfeiture of shares should not apply. Of course the right is measured by the English law, subject to the qualifications in respect to the rule of evidence, the necessity and reasonableness of which I have undertaken to point out, and the rule for which I contend involves the idea that no intendment or presumption as to regularity of corporate proceedings should be accepted in favor of a foreign and alien corporation which sues here, and that we may and should adopt a different rule as to the burden of proof in respect to the material questions involved in an alleged right of recovery than that adopted by the domiciliary courts; and when the right is established the remedy is according to the remedy usually employed for the enforcement of such a right in England, the home of the corporation.

101 & 102

103 United States Circuit Court of Appeals for the First Circuit, October Term, 1900.

NASHUA SAVINGS BANK, Defendant, Plaintiff in Error,
v.
ANGLO-AMERICAN LAND MORTGAGE AND AGENCY COMPANY, Limited, Plaintiff, Defendant in Error. } No. 303.

Judgment in Circuit Court of Appeals.

APRIL 24, 1901.

This cause came on to be heard January 5, 1900, upon the transcript of the record of the circuit court of the United States for the district of New Hampshire, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the circuit court is affirmed.

By the court,

JOHN G. STETSON, *Clerk.*

104 United States Circuit Court of Appeals for the First Circuit.

NASHUA SAVINGS BANK, Defendant, Plaintiff in Error,
v.
ANGLO-AMERICAN LAND MORTGAGE AND AGENCY COMPANY, Limited, Plaintiff, Defendant in Error. } No. 303.

Clerk's Certificate.

I, John G. Stetson, clerk of the United States circuit court of appeals for the first circuit, certify that the printed pages, numbered 1 to 70, inclusive, hereto prefixed, contain and are a true copy of the writ of error to the circuit court of the United States for the district of New Hampshire, and the return of said circuit court thereon, in the cause entitled in said circuit court.

ANGLO-AMERICAN LAND MORTGAGE AND Agency Company, Limited,
v.
NASHUA SAVINGS BANK. } No. 420. Law Docket.

I further certify that said pages, numbered 1 to 70, inclusive, contain and are a true copy of the record upon which the said cause was heard in said circuit court of appeals, January 5, 1900.

I further certify that the printed pages, numbered 71 to 102, inclusive, hereto prefixed, contain and are a true copy of the opinion of said circuit court of appeals in said cause, and that the printed page, numbered 103, contains and is a true copy of the final judgment entered in said cause, April 24, 1901.

I further certify that said printed pages, numbered 1 to 103, inclusive, contain and are a true copy of the record and all proceed-

ings in said cause in said circuit court of appeals, to and including June 14, 1901, and that a mandate has not issued.

In testimony whereof, I hereunto set my hand and affix the seal of said United States circuit court of appeals for the first circuit, at Boston, in said first circuit, this fourteenth day of June, A. D. 1901.

[Seal United States Circuit Court of Appeals, First Circuit.]

JOHN G. STETSON, *Clerk.*

105 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the first circuit, Greeting:

Being informed that there is now pending before you a suit in which Nashua Savings Bank is plaintiff in error and Anglo-American Land Mortgage and Agency Company, Limited, is defendant in error, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the district of New Hampshire, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and
106 removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 11th day of November, in the year of our Lord one thousand nine hundred and two.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

107 United States Circuit Court of Appeals for the First Circuit, October Term, 1901.

NASHUA SAVINGS BANK, Defendant, Plaintiff in Error,
vs.
ANGLO-AMERICAN LAND MORTGAGE AND AGENCY COMPANY, Limited, Plaintiff, Defendant in Error. } No. 415.

Stipulation.

It is hereby agreed between the parties to the above-entitled cause that the certified transcript of the record and proceedings in this cause already filed in the Supreme Court of the United States by The Nashua Savings Bank, defendant, plaintiff in error, with its petition for a writ of certiorari, in the cause of The Nashua Savings Bank petitioner *vs.* Anglo-American Land Mortgage and Agency Company, Limited respondent, number 415 of the October term of that court

for 1901, may be taken as the return to the writ of certiorari issued by the Supreme Court of the United States in that cause, on the 4th day of November, A. D. 1901, to the judges of the United States circuit court of appeals for the first circuit.

Dated New York Nov. 23" 1901.

OMAR POWELL,
Attorney for Anglo-American Land Mortgage & Agency Co., Defendant in Error.
JOHN S. F. FUNK,
Attorney for Nashua Savings Bank, Petitioner.

108 *Return on Writ of Certiorari.*

United States Circuit Court of Appeals for the First Circuit.

And now here the judges of the United States circuit court of appeals for the first circuit make return of this writ by annexing hereto and sending herewith a stipulation between counsel for the respective parties in the cause in the Supreme Court of the United States wherein this writ of certiorari issued, "that the certified transcript of the record and proceedings in this cause already filed in the Supreme Court of the United States by The Nashua Savings Bank, defendant, plaintiff in error, with its petition for a writ of certiorari in the cause of The Nashua Savings Bank, *vs.* The Anglo-American Land Mortgage and Agency Co., Limited, numbered 415 of the October term of that court for 1901, may be taken as the return of the writ of certiorari issued by the Supreme Court of the United States in that cause on the eleventh day of November, A. D. 1901."

Seal United States Circuit Court of Appeals, First Circuit.

In testimony whereof I, John G. Stetson, clerk of said United States circuit court of appeals for the first circuit, hereto set my hand and affix the seal of said court at Boston, in said first circuit, this twenty-fourth day of December, 1901.

JOHN G. STETSON, *Clerk.*

109 [Endorsed:] File No. 18,268. Supreme Court of the United States. No. 167, October term, 1902. Nashua Savings Bank *vs.* Anglo-American Land Mortgage and Agency Co., Limited. Writ of certiorari and return of the United States circuit court of appeals for the first circuit thereon. Filed Jan. 6, 1902.

19526

The Supreme Court of the United States.

OCTOBER TERM, 1901.

Ex-parte the Nashua Savings Bank, Petitioner.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Petition for a writ of certiorari requiring the Circuit Court of Appeals for the First Circuit to certify to the Supreme Court, for its revision and determination, the writ of error taken by the Nashua Savings Bank, a corporation of the State of New Hampshire, against The Anglo-American Land Mortgage and Agency Company, Limited, a corporation of London, England.

1. Your petitioner is a corporation duly established by and under the laws of the State of New Hampshire, and a citizen of said state, and the defendant is a corporation under the laws of England, and an alien and citizen of England.

2. An action of assumpsit was brought by the said Anglo-American Land Mortgage and Agency Company, Limited, against your petitioner in the United States Circuit Court for the District of New Hampshire, on the 20th day of May, 1896.

3. The declaration in said action is as follows:

"In a plea of the case for that the said defendant heretofore, to wit, on the 2nd day of December, A. D., 1895, at said London, to wit, at Nashua in the state of New Hampshire in the United States of America, was further indebted to the said plaintiff in a large sum of money, to wit, eight thousand dollars for a certain call and assessment made by said company in pursuance of its charter and by-laws, at said London, to wit, on the 10th day of July, A. D., 1895,

and to be paid on the 3d day of December, A. D., 1895, upon the defendant's subscription to and ownership of a large number, to wit, one thousand shares at ten pounds sterling each, to wit, fifty dollars each of the capital stock of said company which subscription had theretofore been made and subscribed in due form by said defendant, to wit, at said Nashua, and of the said assessment and call the said defendant has notice at Nashua in the state of New Hampshire, heretofore to wit, on the 2d day of December, A. D. 1895, and thereafter, to wit, at said Nashua, on the 2d day of December, A. D. 1895, in consideration thereof, the defendant then and there promised the plaintiff to pay said sums on demand with interest at the rate of seven per cent per annum from the time the same became due and payable as aforesaid. Yet, though often requested, the defendant has never paid said several sums of money, or any of them, but has neglected and refused so to do."

4. And the plea is the general issue, with a brief statement of defense, of which the material allegations are as follows:

(1) It denies the said plaintiff corporation was ever duly organized, or that all the shares necessary to enable said corporation to duly and legally organize have ever been subscribed for or taken.

[Omitting numbers (2) to (6) inclusive as immaterial.]

(7) It says the plaintiff corporation has purposely and with a view to making unlawful assessments and calls, intentionally debarred the American stockholders from attending any meeting of said company, by neglecting to give the American subscribers to stock in said company, including the defendant, seasonable notice of the meetings of said company, at which said alleged assessments were voted, so that it would be possible for them to attend said meetings for want of such seasonable notice, and the defendant will claim that the assessments are invalid for this and other causes.

(8) It says the assessment declared upon was not a legal assessment against the stockholders in said company, because no notice to the stockholders was ever given of a meeting to consider the subject of making an assessment upon said stock, so as to render it possible for the stockholders to be present, or to be represented at such meeting.

(9) It says the assessments attempted to be collected in this suit are invalid, unlawful and unauthorized.

(10) It says that no assessment whatever was made, or is alleged to have been made, upon the stock alleged to have been sold, assigned, transferred and delivered to the defendant by said James Lewis Lombard, since said alleged sale, assignment, transference and delivery.

(11) It says that defendant never subscribed for any of the stock of said plaintiff corporation, nor was it at the time of said alleged assessment, nor has it ever been the owner of any such stock.

5. This action was brought to recover of your petitioner, as a stockholder in the Anglo-American Land Mortgage & Agency Company, unpaid assessments upon stock; and the case was heard before a jury, the Honorable William L. Putnam as circuit judge presiding, who at the close of the trial directed a verdict in behalf of the plaintiff and rendered a special opinion, which may be found at pages 41 to 52 of the copy of the record herewith filed; and who upon the facts and law so found ordered judgment against your petitioner. From this judgment a writ of error was taken to the United States Circuit Court of Appeals for the First Circuit.

6. The case having been heard before Judges Colt, circuit judge, and Aldrich and Brown, district judges, a majority opinion was delivered by Chief Justice Brown, sustaining the judgment of the Circuit Court, and a dissenting opinion was filed by Judge Aldrich, as appears of record.

7. The plaintiff, in order to prove the laws of Great Britain, read from the deposition of one Frederick H. Ramsden to the effect that he was a solicitor of the Supreme Court of Judicature of England, and familiar with the corporation laws of England under the Companies act of Great Britain, and he then produced printed portions of the Statute of Great Britain, as the laws of Great Britain. The petitioner objected to this mode of proof of the laws of a foreign country for reasons assigned in the record and set forth in the accompanying brief. The court admitted the evidence and petioner excepted.

8. The plaintiff introduced no evidence whatever that the plaintiff corporation was insolvent at the time of the making the calls or assessments sued upon, or at the time of the bringing of this suit, or that the call or assessment was made for the benefit of its

creditors or in payment of its debts. No promise, express or implied, to pay such assessment was proven other than that following the acceptance and retention of the certificate of stock by defendant and the articles of association and rules and regulations referred to in said certificate of stock, and the Statutes of Great Britain.

9. At the close of all the evidence in the case, and before the court charged the jury, the defendant moved that the court direct a verdict for the defendant on the pleadings and evidence in the case, for the reasons hereafter specifically stated:

Because (1) the declaration sets up an action in case, when it should have been in debt.

Because (2) the plaintiff is an alien corporation, and the declaration contains no averment or allegation as to the law of Great Britain, under which it is claimed said corporation was organized.

Because (3) the declaration contains no averment or allegation of any law of England or Great Britain authorizing the plaintiff to make the call or assessment sought to be recovered herein.

Because (4) the declaration contains no averment or allegation that said call or assessment was necessary to pay the debts of the plaintiff, or was made for the benefit of its creditors, and contains no averment or allegation upon what condition the plaintiff was authorized to make such calls or assessments and collect the same.

Because (5) the declaration contains no averment or allegation that any notice was ever given of such call or assessment to defendant.

Because (6) the declaration contains no averment or allegation that the defendant ever made any express promise to pay any such call or assessment.

Because (7) the declaration contains no direct averment or allegation that the payment of such call or assessment was ever demanded of defendant.

Because (8) the declaration contains no averment or allegation of the conditions or terms of the defendant's subscription to the stock of the plaintiff.

Because (9) the declaration contains no direct averment or alle-

gation that the defendant was a stockholder in said company at the time said call or assessment was made.

Because (10) there was no evidence in the case of an express promise on the part of the defendant to pay such call or assessment.

Because (11) there was no evidence in the case that this suit was instituted or carried on for the benefit of the creditors of the plaintiff or that this call or assessment was made for the payment of debts or other obligations of the plaintiff, and because the evidence tended to show that the plaintiff was not insolvent at the time of making the call or assessment or at the time of the institution of this suit.

Because (12) this action to recover calls and assessments cannot, in the absence of an express promise to pay on the part of the defendant, be maintained, unless to enforce the collection of the sum due thereon for the benefit of the creditors of the plaintiff corporation, or in payment of its debts.

Because (13) this remedy, under a statute of England and Great Britain, if enforceable at all, should be in debt. Upon each ground the court refused to direct a verdict for the defendant, to each of which refusals the defendant duly and seasonably excepted.

10. The respondent introduced in evidence, against your petioner's exception, a certified copy of the petitioner's account with the respondent, from the respondent company's book styled the Register of Members, but nothing further from that book was introduced, the circuit judge remarking that if the entire record was present he would not allow anything read except this.

To this introduction of extracts from said book the petitioner excepted for reasons, that the whole record was not introduced, and that it might appear that there was a registry of all the shareholders of the company appearing upon this book, and of their assessments and accounts.

11. The Circuit Court in its charge said that it was sufficient for the plaintiff that the corporation is a corporation de facto, and the retention by the defendant of its certificate of stock, produced at the trial upon request of the plaintiff, might operate as an estoppel to prevent your petitioner from denying that the plaintiff is,at

least, a corporation de facto. To this ruling the petitioner excepted.

12. The Circuit Court said in its charge that the proof of the statutes of Great Britain was made within the rule in that particular laid down by the Supreme Court of the state of New Hampshire in Hall vs. Costello, 48 N. H. 176, and that except for that decision it would be compelled to find that the statutes of Great Britain could not be proved in the way the plaintiffs have undertaken to prove them. To this ruling, that the proof of the statutes of Great Britain was within the rule laid down by the Supreme Court of New Hampshire, your petitioner excepted.

13. The court said: "The habitat of the plaintiff corporation is London, and the parties by their own free act have submitted themselves to the laws of Great Britain with reference to their mutual relations, and to all the acts of the corporation done at its domicile which are consistent with those laws. Therefore, I must be governed by the laws of Great Britain, so far as they are shown in the case; and, so far as they are not shown in the case, I must presume them to be the fundamental principles of the common law, with reference to which the federal courts are governed by their own rules, and do not accept the decisions of the local courts except so far as those decisions approve themselves to their judgment. In other words, to state the matter accurately, in so far as the laws of Great Britain are not proved, I am undoubtedly bound to assume that they are the same as the laws of New Hampshire, where this court is sitting; but, as to the laws of New Hampshire, with reference to a question of a general character we are not controlled by the decisions of the courts of New Hampshire except as they commend themselves to our own judgment."

To that part of this ruling, to the effect that the court is not controlled by the decisions of the courts of New Hampshire, except as they commend themselves to its judgment, your petitioner duly excepted.

14. The court ruled that the only remedy as held by the courts of Maine, New Hampshire and Massachusetts was by a forfeiture and sale of the stock; and a loss of what has been paid in upon it, by the defendant or its predecessors in title; but that that doctrine was contrary to the ordinary principles of law and that de-

fendant was liable pecuniarily for this call. To that part of the ruling of the court that the remedy for forfeiture and sale was not exclusive, your petitioner duly excepted.

15. The court ruled that the delivery to, and the receipt by, the petitioner of one thousand shares of the stock of the plaintiff corporation, such stock not being paid for and not being a gratuity, is like the delivery of any other property from one person to another, and by accepting delivery and retaining the property the petitioner impliedly promised to pay for it, at the times, and in the installments provided for in the articles of association. To this ruling of the court, that the receipt of the certificates of stock by the petitioner raised an implied promise to pay for it, the petitioners duly excepted.

16. The Circuit Court ruled that the action need not be in debt, but might be in indebitatus assumpsit. To this the petitioner duly excepted.

17. The court ruled that there was evidence of an agreement on the part of the petitioner, not a direct contract, but one arising from the relation of the parties, under the legislation of Great Britain, to pay this assessment existed. To this ruling the petitioner duly excepted.

18. The court ruled that this suit could be maintained on common law principles and independently of the statutes of Great Britain. To this ruling the petitioner duly excepted.

19. The petitioner objected to the instructions given by the Circuit Court as being against the pleadings and evidence for the reasons specifically stated:

Because (1) the declaration sets up an action in case when it should have been in debt.

Because (2) the plaintiff is an alien corporation and the declaration contains no averment or allegation as to the law of Great Britain and England under which it is claimed said corporation was organized.

Because (3) the declaration contains no averment or allegation of any law of England or Great Britain authorizing the plaintiff to make the call or assessment sought to be recovered herein.

Because (4) the declaration contains no averment or allegation that said call or assessment was necessary to pay the debts of the

plaintiff or was made for the benefit of its creditors, and contains no averment or allegation upon what condition the plaintiff was authorized to make such calls or assessments and collect the same.

Because (5) the declaration contains no averment or allegation that any notice was ever given of such call or assessment to defendant.

Because (6) the declaration contains no averment or allegation that the defendant ever made any express promise to pay any such call or assessment.

Because (7) the declaration contains no direct averment or allegation that the payment of such call or assessment was ever demanded of defendant.

Because (8) the declaration contains no averment or allegation of the conditions of defendant's subscription to the stock of said plaintiff.

Because (9) the declaration contains no direct averment or allegation that the defendant was a stockholder in said company at the time said call or assessment was made.

Because (10) there was no evidence in the case of an express promise on the part of the defendant to pay such call or assessment.

Because (11) there was no evidence in the case that this suit was instituted or carried on for the benefit of the creditors of the plaintiff, or that this call or assessment was made for the payment of debts or other obligations of the plaintiff, and because the evidence tended to show that the plaintiff was not insolvent at the time of making the calls or assessment, or at the time of the institution of this suit.

Because (12) this action to recover calls and assessments cannot, in the absence of an express promise to pay on the part of the defendant, be maintained, unless to enforce the collection of the sum due thereon for the benefit of the creditors of the plaintiff corporation or in payment of its debts.

Because (13) this remedy, under the Statute of Great Britain, if enforceable at all, should be in debt.

20. Your petitioner requested the court to instruct the jury that if any action can be maintained for the recovery of the sum due under the call and assessment sought to be enforced in this action by

the plaintiff, the lien thereon must be enforced by sale and forfeiture of these shares before this action can be maintained. The court refused to instruct the jury, as above requested; to which refusal, the defendant duly and seasonably excepted.

21. The case was heard in the Circuit Court before Judge Putnam, who ordered a verdict to be returned for the plaintiff, which was done, the damages being assessed at the sum of six thousand, eight hundred fifty-eight dollars and sixty-seven cents.

22. The Nashua Savings Bank duly appealed from the judgment of the Circuit Court to the Circuit Court of Appeals for the first circuit, and after hearing the said Circuit Court of Appeals affirmed the judgment of the Circuit Court; Aldrich, judge, dissenting.

A certified copy of the entire record of the said case in the said Circuit Court of Appeals is herewith furnished as part of this application in conformity with rule 37 of this honorable court relative to cases from Circuit Court of Appeals, and the same is marked Exhibit "A."

Your petitioner is advised and believes that the said judgment of the said United States Circuit Court of Appeals in said case is erroneous, and that this honorable court should require the said case to be certified to it for its review and determination under and in conformity with the provisions of the sixth section of the act of congress entitled "An act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes, approved March 3, 1891, the said case being made final in the said Circuit Court of Appeals by the said act.

Your petitioner recites the supposed errors of the Court of Appeals upon which it desires the review and consideration of this court as follows:

(1) The Circuit Court of Appeals erred in assuming that the proofs of the regularity of this call might have sufficiently appeared at the trial, so far as appears from the record. Whereas, your petitioner claims that the record shows for itself that it was substantially complete, and that nothing appears upon it, from which the Court of Appeal could justly assume that any such evidence of regularity existed, or that any evidence existed dehors the record,

and that it appears on the record that the respondent introduced the evidence which is subsequently recited in the record, and it nowhere appears that the respondent at any time introduced any other evidence, or that this recital of evidence is in any wise incomplete.

(2) A material question in the case being as to whether said assessment was regularly made for a lawful purpose, and there being no evidence for the purpose for which it was made, as appears of record, now the Circuit Court of Appeals erred in refusing to pass judgment upon the question whether or not it was to accord to the corporate proceedings of a foreign and alien corporation the same presumption of regularity that exists in respect to domestic corporations.

(3) The Circuit Court of Appeals erred in refusing to consider whether or not, upon the facts recited in the record, a promise to pay these assessments could be implied, there being no express promise, and no evidence as to what the law of England is in this behalf.

(4) The Circuit Court of Appeals erred in holding that there could be any recovery of these assessments, it not appearing that they were made for the benefit of creditors, or for payment of the debts of the plaintiff corporation. And it erred in holding that there might have been evidence that the call was regularly made, and for a proper purpose.

(5) The Circuit Court of Appeals erred in assuming that in the absence of testimony as to the purpose for which these calls were made, they might have been made for the benefit of its creditors, for payment of its debts, or because of the insolvency of the corporation.

(6) The Circuit Court of Appeals erred in holding upon all the evidence disclosed on the record, unaided by presumptions of regularity of corporate proceedings, the verdict was warranted, and in effect throwing upon your petitioner the burden of proving that the call was irregular and invalid.

(7) The Circuit Court of Appeals erred in holding the declaration in this case set forth sufficient allegations to enable a recovery under it.

(1) The action should have been in case, and not in debt.

(2) The declaration contains no averment or allegation as to the law of Great Britain, under which it is claimed the plaintiff was organized.

(3) It contains no averment or allegation of any law of Great Britain authorizing the plaintiff to make this assessment.

(4) It contains no allegation that said assessment was necessary to pay the debts of the plaintiff, or was made for the benefit of its creditors; and contains no averment upon what condition the plaintiff was authorized to make and collect such assessments.

(5) It contains no allegation that any notice of such call was ever given defendant.

(6) It contains no allegation that the defendant ever made any express promise to pay any such call or assessment.

(7) It contains no direct averment that the payment of such call was ever demanded of defendant.

(8) It contains no allegation of the conditions or terms of the plaintiff's subscription to the stock of the plaintiff.

(9) It contains no direct allegation that the defendant was a stockholder in the plaintiff company at the time said assessment was made.

(8) The Circuit Court of Appeals erred in not holding that in the absence of evidence as to the laws of Great Britain as to the mode of collecting assessments of this character, and in view of the laws of New Hampshire, the place where the case was tried, as to the mode of such collections, the laws of New Hampshire prevailed. It being the rule of law, as your petitioner understands, that the law of the place of contract prevails, but there being no evidence of the law of the place of contracting, the law of the forum should have prevailed. In the absence of proof of the laws of Great Britain upon this subject, the remedy should be according to the laws of New Hampshire,—by sale and forfeiture.

(9) The laws of England, as the petitioner claims, should have been proven (A) by exemplification under Great Seal.

(B) By certificate of an officer having authority to make it.

(C) By testimony from comparison with original enrollment.

(10) And your petitioner further says that it is apparent from the majority opinion of the Court of Appeals that said court, there

being evidence of the assessment of this stock, assumed that the same was regularly made, and for some lawful purpose. And your petitioner claims that such assumption in behalf of an alien corporation is without judicial precedent and erroneous. And that this question is new and of great importance, and involves in this and analogous suits large interests.

Wherefore your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this court directed to the United Stases Circuit Court of Appeals for the first circuit, commanding the said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein entitled

Nashua Savings Bank Defendant, Plaintiff in Error

vs.

Anglo-American Land Mortgage and Agency Co. Limited, Plaintiff, Defendant in Error,

No. 303 on the docket of said court, to the end that the said case may be reviewed and determined by this court as provided in section 6 of the act of Congress, entitled "An act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, or that your petitioner may have such other or further relief or remedy in the premises as to this court may seem appropriate and in conformity with the said act, and that the said judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this honorable court.

NASHUA SAVINGS BANK,
By THOMAS D. LUCE, *Assignee.*

UNITED STATES OF AMERICA.

State and District of New Hampshire.

HILLSBOROUGH ss.

NASHUA, Sept. 18, 1901.

Personally appeared before me, a notary public, within and for said County and State, the above named Nashua Savings Bank by Thomas D. Luce, Assignee, and made oath that the allegations of the foregoing petition by it subscribed are true, to the best of its knowledge, information and belief.

WITNESS my hand and notarial seal at said Nashua, the day and year above written.

[Seal] Fred D. Crosa *Notary Public.*

I, John S. H. Frink, having been duly admitted to practice in the Supreme Court of the United States, as an attorney and counsellor of the Court, do hereby certify that the foregoing petition for a writ of certiorari has been examined by me, and that in my opinion, for the reasons therein set forth, the writ ought to issue as prayed for.

JOHN S. H. FRINK.

PORTSMOUTH, NEW HAMPSHIRE,
Sept. 19, 1901.

The Supreme Court of the United States.

OCTOBER TERM, 1901.

NASHUA SAVINGS BANK, *Petitioner,* v. ANGLO-AMERICAN LAND MORTGAGE AND AGENCY COMPANY, LIMITED, *Respondent.*	IN PETITION FOR CERTIORARI

Brief in support of petition for Certiorari by NASHUA SAVINGS BANK, Petitioner,

J. S. H. FRINK, Counsel for Petitioner.

This is an action of of assumpsit brought to recover an unpaid assessment or call made by the ANGLO-AMERICAN LAND MORTGAGE AND AGENCY COMPANY, LIMITED, against the NASHUA SAVINGS BANK, a stockholder.

The petitioner is a New Hampshire Corporation. The respondent is an alien Corporation, organized under the Companies act of England.

The case was tried before Hon. William L. Putnam, Circuit Judge for the First Circuit with a jury. The Circuit Judge directed the jury to return a verdict for the original plaintiff, the Anglo-American Land Mortgage and Agency Company, and on the 30th day of June 1898, the jury returned such verdict assessing damages in the sum of six thousand, eight hundred and fifty-eight dollars and sixty-seven cents.

On the 29th day of October, 1898, a bill of exceptions was allowed, and upon error, those exceptions were heard by the Circuit Court of Appeals, and on the 24th day of April, 1901, by a majority opinion the judgment of the Circuit Court was approved by Judges Colt and Brown, Judge Aldrich dissenting.

The declaration and pleadings appear upon the 3d–9th pages of the Record inclusive, but the trial proceeded under the third count in the declaration on page 6 of the Record.

The evidence introduced by the original plaintiff, (respondent in petition,) consisted of the deposition of Frederick H. Ramsden, an English solicitor, portions of certain statutes of Great Britain, claimed to have been authenticated by Mr. Ramsden's deposition, also a memorandum of the association of said company, a certificate of incorporation, articles of association of the respondent company, certificate of stock issued to the petitioner, and endorsement of payment on account of said shares on the back of the certificate, and notice of the call to the petitioner.

See Bill of Exceptions, pages 13 to 28 of Record inclusive.

The defendant (your petitioner) read in evidence certain of the articles of association appearing on pages 29 and 30 of the Record, but introduced no further testimony.

The defendant moved the Circuit Court, after all the evidence in the case was in, to direct a verdict for the defendant and assigned as cause therefor the reasons given on pages 30 and 31 of the Record.

The court then charged the jury as found in the Record and directed a verdict for the original plaintiff (the respondent.)

The case fairly raises the important question whether upon the evidence, appearing of record, the Circuit Court should not have directed a verdict for your petitioner, (the defendant below,) and not for the respondent (the plaintiff below.)

The majority opinion of the justices of the Court of Appeals proceeds upon the proposition that the Record does not purport to contain all the evidence, and therefore they decline to consider the question.

Page 72 of Record.

The minority opinion meets the issue squarely, and Judge Aldrich discusses the question with great fairness and intelligence.

The majority of the court erred in the assumption that the Record does not contain all the material evidence in the case, indeed substantially all the evidence material or immaterial in the case.

On page 13 of this Record is found this recital:

"At the trial before the jury begun on the 27th day of June, A. D. 1898, the plaintiff introduced the following evidence."

No words of exclusion or limitation are used, and the fair construction of the words is, that the subsequent pages of the printed record contain all the evidence introduced by the plaintiff. There is nothing in the Record negativing or controlling this conclusion.

We submit confidently that it appears that all the evidence in the case was before the Circuit Court, and that the court should have acted upon that hypothesis.

It is true that all of the deposition of Mr. Ramsden does not appear in the case, but there is no evidence and no presumption that it was all read by the plaintiff below. Certain portions of it may have been omitted. We refer the court to the remark or ruling of Judge Putnam (page 28, Record) and the statement at bottom of page 26 of Record.

There was no evidence whatever of any compliance with any conditions precedent, or that other subscribers to the capital stock had paid their subscriptions, or had been assessed equally with this petitioner.

It appearing, as we maintain, that all the evidence was before the Court of Appeals and that the majority of the court found it convenient on the plea of an imperfect record to avoid determining the question as to whether there was sufficient evidence to justify the verdict, we ask this court to review their decision.

I.

Our first proposition then is that the majority of the justices of the Court of Appeals erred in refusing to consider the question as to whether the Circuit Court should or should not have directed a verdict for your petitioner, upon the ground of insufficiency of evidence.

Upon this question we submit that the petitioner is entitled to the judgment of some court; and as it did not obtain that of the Court of Appeals, it is entitled to that of this tribunal—unless our

claim, that the evidence in the court below was too meagre to support a verdict, is too frivolous to demand serious consideration.

II.

Our second proposition is that the evidence of record cannot support the verdict, unless aided by the presumption that the proceedings in the organization of this foreign company and in laying the assessment were regular, legal, and for a lawful purpose.

Conceding for the purpose of this argument that the Statutes of Great Britain were properly proven by Mr. Amsden and the regularity of the organization of the respondent company, yet there is an absolute want of any testimony as to whether there was any lawful occasion for any call as to the purpose for which the money was to be raised, whether for a lawful or unlawful purpose, whether the company was solvent or insolvent, whether it was needed to pay debts, or expenses, or whether it was intended for gratuitous distribution, &c., &c.

Now, if it is a presumption of law that all these proceedings and purposes were lawful in the case of a foreign company, as perhaps it is in the case of a domestic corporation, our objection may not be well taken, but that is one question upon which we want the opinion of the court.

This seems to us a question of importance. We do not find that it has ever been fully considered and determined by this court. It may have been, but we have not discovered the case.

This question is of great importance when we consider the numberless international corporate enterprises in which American citizens are now interested.

In Am. Pastoral Co. vs. Gurney, 61 Fed. Rep. 41, it was held that the validity of calls made by a British Corporation for unpaid stock is to be determined by the British laws.

This must of course be so, if the British law is duly proven, but British law is a question of fact, and was not shown in the case at bar.

It may be said, none the more were they proven in the case last cited; that the Articles of Association in this case as in that, gave the directors authority to issue calls for unpaid subscriptions. No question appears to have been raised in that case as to the purposes

for which the calls were made, nor as to whether there was any presumption in favor of their legality. We ask a determination of this question.

The evidence in the case at bar, as has been said in the dissenting opinion, consisted entirely of some (we say irregular) proof of the English Statutes, the Articles of Association and the call and notice of it. The necessity of proof that the call was uniform (see pages 30 and 31 Record) or that the proceedings were regular, or that it was made for a lawful purpose, that it was not made for some purpose unlawful or "ultra vires," was denied by the Circuit Court.

If any of these facts had appeared, of course there could have been no recovery. It is the presumption that all the proceedings were regular and lawful that enables the recovery of such calls in the case of a domestic corporation. The case presents the question whether such presumption obtains in the case of an alien corporation.

Many reasons occur from analogy as well as reason, why the case of an alien corporation is distinguishable from that of a domestic one.

(1) The proof of the regularity or necessity of the call is entirely in the hands of the company itself, while it is almost inaccessible to the stockholder of another country.

(2) Foreign laws are to be proven and established as facts, domestic ones are within judicial knowledge.

(3) Foreign judgments are as a general proposition impeachable. They are not entitled to the same effect as judgments of domestic courts (independent of Art. 4 of the Constitution.)

Hanley vs. Donoghue, 116 U. S. 4.
Wisconsin vs. Insurance Co., 127 U. S. 292.
Christmas vs. Russell, 5 Wall 304.

By parity of reasoning we think the effect to be given to the acts of a foreign corporation cannot carry the same conclusive presumption of regularity in the absence of any evidence to that effect, as in the case of domestic corporations.

When a court takes judicial notice of the laws under which certain acts are done, it is a natural conclusion that these acts are well done, or the court would discover it; but when a court will take no cognizance of the laws without proof, then it seems an ex-

treme conclusion to assume that the acts done under them are regular, without at least proof of the effect given these acts in the jurisdiction where they are done.

Perhaps the distinction between the recognition given by the courts to a domestic and foreign corporation furnishes a closer illustration of the presumption to be accorded its acts than almost any other example.

It seems to be the well accepted rule of law that a domestic corporation is assumed to be duly created,

Angell & Ames on Corporations, 7th Ed. Sec. 632.
Savage vs. Russell, 84 Ala. 103.
Webster vs. Upton, Assignee, 91 U. S. 65.
Chubb vs. Upton, 95 U. S. 665.
Telegraph Co. vs. Purdy, 162 U. S. 329, 336.
Haile vs. Hardon, 95 Fed. Rep. pp. 752 and 757,

While in the case of a foreign corporation not only must it be proved, but also there must be proof of the laws authorizing its creation.

Thompson's Commentaries of the Law of Corporations, Sec. 7712.

The distinction raised we regard as important.

III.

We further desire this court to review the decision of the Court of Appeals, sustaining the opinion of the Circuit Court, that at the trial below the Statutes of Great Britain were proved according to the established rules of law.

The materality of the proof of these Statutes is conceded.

It is elementary law that the Statutes of Great Britain are facts, of which this court does not take cognizance without proof.

Liverpool G. W. Steam Co. vs. Insurance Co., 129 U. S. 445.

ORDINARY MODES OF PROOF.

(1) By exemplification under Great Seal.
(2) By certificate of an officer having authority to make it.
(3) By testimony from comparison with original enrollment.

Church vs. Wheaton, 2 Cranch 238.
Emery vs. Berry, 28 N. H. 485.

DISTINCTION BETWEEN PROOF OF WRITTEN AND UNWRITTEN LAW, RECOGNIZED IN EMERY VS. BERRY.

The Circuit Court recognized the modes of proof, as above suggested, as the appropriate ones and the distinction between the modes of proving written and unwritten foreign laws, but held that the strict rule had been relaxed in New Hampshire in

Hall vs. Costello, 48 N. H. 176.

It is true the mode of proving the laws of Canada in that case was not in strict conformity to the formal rules, adopted in Emery vs. Berry, but it was not relaxed sufficiently to admit the Statutes of Great Britain as proven here.

DISTINCTION BETWEEN MODE OF PROOF ADOPTED IN HALL VS. COSTELLO AND IN CASE AT BAR.

The syllabus covers what was done in Hall vs. Costello. It is in these words:

"In proof of the laws of a foreign country, the testimony of any person, whether a professional lawyer or not, who appears to be well informed upon the subject is competent."

In conformity to this rule, two New Hampshire lawyers having had occasion to learn from their practice what the law of Canada was, stated it, gave their sources of information, and fortified themselves by reference to the printed laws.

It was not an attempt to prove the Statutes of Great Britain by a copy of them, but their import by the mouth of witnesses.

In the case at bar, no such course was pursued.

It became necessary for the (original) plaintiff to prove under the plea and brief statement,

See Record, page 7,

not only that the company was duly organized under the laws of Great Britain, but that under the laws of Great Britain it had a cause of action, and to lay the foundation of the proof of these laws they produce a Mr. Ramsden.

See Record, page 16.

Now if they had asked Mr. Ramsden what the laws of Great Britain were, and allowed him to have refreshed his recollection by reference to the printed Statutes, they would have brought themselves within the rule in Hall vs. Costello.

He didn't undertake at all, of his own knowledge, to give the laws of Great Britain written or unwritten.

He says the plaintiff was a company formed under certain acts. He doesn't as an expert even say they had in all respects complied with the requirements of those acts. He then, without any authentication, produces what he says are copies of the acts printed by Her Majesty's printer, with the remark that they are by law receivable in evidence without further proof. I suppose by that latter remark he doesn't mean to testify as an expert to this court that they are receivable in evidence here without further proof.

That last remark is a solution of his whole testimony. He doesn't intend as an expert to enlighten this court as to what the law of Great Britain is from his own testimony, but simply to produce certain printed or written transcripts, which he says prove themselves.

This would be true in Great Britain and its dependencies, but not in a foreign country.

We adopt the idea, if not the language, of the Lord Chancellor in Sussex Peerage case, 11 Clark & F., 85, when he says the witness may refresh his recollection by reference to the written law, but the proof of the law is to be from the witness, not the book.

The witness' testimony has not added a word to the copies of the Statute. If it is enough to present a portion of the enactment of a foreign country, purporting to be printed by authorities without any verification, then these Statutes have been proven, otherwise not.

Beach vs. Workman, 20 N. H. p. 383.

The general rule as to the proof of foreign laws is that the law which is written, that is Statute law, must be proved by a copy properly authenticated; and that the unwritten law must be proved by the testimony of experts; that is, by those acquainted with the law.

Ennis vs. Smith, 14 How, 400.
Pierce vs. Indseth, 106 U. S. 551.

It would seem, in the case last cited, the state Statute per-

mitted proof very similar to that attempted by plaintiff, but it would have been inadmissible but for such Statute. We repeat, no law of New Hampshire justifies it.

Supposing in a trial in New Hampshire a lawyer of Massachusetts was called to prove the corporation law of their commonwealth, and did it by presenting certain detached printed chapters of the Statutes of that state, to the court or jury, without further comment than that they were printed by authority and receivable on evidence there without proof, is there any known rule of law which would justify such proof?

IV.

On the fifty-eighth page of the Record will be found this assignment of error:

"The Circuit Court erred in denying the motion of the defendant to direct a verdict for the defendant on the pleadings and evidence in the case."

Subdivisions (2,) (3.) (4,) (6) and (8.)

See also paragraphs (19,) (20,) (21,) (23,) (25,) in assignment of errors, pages 65 and 66 of Record.

The exceptions, to which we now call the attention of the court, relate to the defective or insufficient statement of the plaintiff's case in the declaration.

The declaration is as follows:

"In a plea of the case for that the said defendant heretofore, to wit, on the second day of December, A. D. 1895, at said London, to wit, at Nashua, in the state of New Hampshire, in the United States of America, was further indebted to the said plaintiff in a large sum of money, to wit, eight thousand dollars for a certain call and assessment made by said company in pursuance of its charter and by-laws, at said London, to wit, on the tenth day of July, A. D. 1895, and to be paid on the third day of December, A. D. 1895, upon the defendant's subscription to and ownership of a large number, to wit, one thousand shares at ten pounds sterling each, to wit, fifty dollars each of the capital stock of said company, which subscription had theretofore been made and subscribed in due form by said defendant, to wit, at said Nashua, and of the said assessment and call the said defendant had notice at Nashua, in the state of New Hampshire,

heretofore, to wit, of the second day of December, A. D. 1895, and thereafter, to wit, at said Nashua, on the second day of December, A. D. 1895, in consideration thereof, the defendant then and there promised the plaintiff to pay said sums on demand with interest at the rate of seven per cent per annum from the time the same became due and payable as aforesaid. Yet, though often requested, the defendant has never paid said several sums of money, or any of them, but has neglected and refused so to do."

Page 13 of Record.

It is not enlarged or aided by any former counts, as they are all eliminated.

This action is founded, in part, upon the Statutes of a foreign country.

The court is presumed to be in absolute ignorance of the laws of Great Britain.

This action is admittedly founded on these laws. How is the court to know, from an inspection of the writ, that these laws give the plaintiff any cause of action?

The court says in Liverpool Steam Company vs. Insurance Company, 129 U. S. R., p. 445:

"The law of Great Britain since the declaration of independence is the law of a foreign country, and like any other foreign law is a matter of fact which the courts of this country cannot be presumed to be acquainted with or to have judicial knowledge of unless it is pleaded and proved."

"The rule that the courts of one country cannot take cognizance of the laws of another without plea and proof has constantly been maintained at law and in equity in England and America." See

Bank of North America vs. Rindge, 154 Mass. 204.
Hancock National Bank vs. Ellis, 166 Mass. 414.

V.

We call the attention to another supposed error of the Court of Appeals in holding that this action could be maintained in the New Hampshire District without evidence of an express promise.

There is no pretence that there was an express promise.

Our contention may be thus succinctly stated.

(1) That plaintiff offered no evidence as to what the law of Great Britain is in regard to the collection of calls or assessments in the absence of an express promise to pay, and without evidence of the necessity of such calls or assessments in order to pay debts, when the articles of association provide for a forfeiture of stock.

(2) There being no evidence as to the law of Great Britain, the court must assume that the law of Great Britain in this behalf is the same as that of New Hampshire.

(3) The law of New Hampshire declares that no such action can be maintained.

The law of England bears the same relation to the courts of the United States that the laws of one of the United States do to the courts of another state of the Union, and we only suggest this because we desire to make an extract from a state case showing the rule, as to the burden, of proving foreign laws, and the presumptions in the absence of such proof.

"Where the question of the law of another state (foreign country) is in controversy, the party upon whom the burden rests will fail, unless evidence is produced to sustain his view; and Statutes and Decisions that were not put in evidence at the trial cannot be used the first time at the argument of the case before the court for the purpose of proving the law of such state (foreign country.)"

'In the absence of anything to show the contrary, there is a presumption that the common law of another state (foreign country) is like that prevailing here."

Kelley vs. Kelley, 161 *Mass. R.* 111.

"Contracts made in a foreign country, in the absence of evidence of what their legal effect would be in the place in which they were executed, receive the same construction and have the same effect as if they were executed in the place where the action to enforce them is brought."

Whidden vs. Seelye, 4 Maine 247,

and many other cases.

Whether an action of assumpsit or debt would lie in Great Britain to enforce this assessment or call, or whether there must be proof of its necessity or whether remedy must be had by forfeiture and sale in the first instance, or exclusively, the plaintiff has offered

no evidence; Great Britain being an alien country, the burden was on plaintiff to prove its laws.

Liverpool G. W. Steam Co. vs. Insurance Co., 129 *U. S.* 445.
Pierce vs. Indseth, 106 *U. S.* 551.

What is the law of New Hampshire in this behalf?

The cases declaring the law of New Hampshire are long continued and uniform.

The rule is thus stated by Judge Woodbury, for many years a justice of the Supreme Court of the United States, as a principle of common law:

"It is well settled that when an act of incorporation gives no express remedy against a member for assessments he is liable to no action for them by virtue of his membership."

"The corporation can enforce payment only by a sale of his shares, and if action can be sustained against him it must be founded on a distinct private promise to pay the sums assessed."

Franklin Glass Co. vs. Alexander, 2 *N. H.* 381.

This case has been affirmed or approved in

Railroad vs. Johnson, 30 *N. H.* 390.
Company vs. Burlingame, 67 *N. H.* 301.
Shattuck vs. Robbins, 68 *N. H.* 565.

Such, too, is the law of Massachusetts and Maine.

But it is said that this court is not bound to follow the decisions of New Hampshire, the question involving principles of general law. No reason appears why this court should not follow the law as administered in New Hampshire, and there are potent reasons why it should.

In the first place it is hardly a question of general jurisprudence. It is rather local than otherwise, and not one arising from or concerning the usages of commerce. None of the reasons, urged in Railroad Co. vs. Bank, 102 U. S. 58, for a uniformity of decisions in transactions of a commercial character apply here.

But there are no Federal decisions contravening the New Hampshire cases, and if none the Federal courts will lean, even in matters of general jurisprudence, towards the views of the state courts.

Burgess vs. Seligiman, 107 *U. S.* 34.

The case of Upton vs. Tribilcock, 91 U. S. 47 was an action by an assignee, and seems to have been decided on the ground that the unpaid subscription was a trust fund for the payment of corporate debts.

Webster vs. Upton, 91 U. S. 65, is simply an affirmation of the rule of law, that an assignee in bankruptcy can maintain an action for the unpaid balance due on stock subscription without an express promise.

In these cases no remedy was provided by forfeiture and sale of the shares as in the case at bar.

The case of Chubb vs. Upton, 95 U. S. 668, is based entirely upon the last two cases referred to.

These cases differ from the one under consideration in that they were suits brought by an assignee in bankruptcy to recover monies to pay the creditors of the corporation, and it does not appear that the charters or articles of association contained any provision for forfeiture and sale of the shares.

But independent of these distinctions, if it appeared affirmatively that the law of Great Britain was that there must first be a sale and forfeiture of the shares, and a suit would not lie without an express promise, then these decisions would be read as part of the contract.

As the law of Great Britain must be assumed to be the same as that of New Hampshire, then the law of New Hampshire constitutes part of the contract, upon the ground that it is the law of the place of the contract.

As said by the court in Hoadley vs. Transportation Co., 115 Mass. 307, it is sometimes difficult to determine whether the rule sought to be applied touches the contract or the remedy. We find some difficulty in determining the question in this case. It would seem to touch the mode of enforcing a liability. If so, it is in remedy, and the rule of the New Hampshire court in that event must govern.

The question had been raised whether or not the words:

"All moneys payable by any member of the company, in pursuance of the conditions or regulations of the company or any such

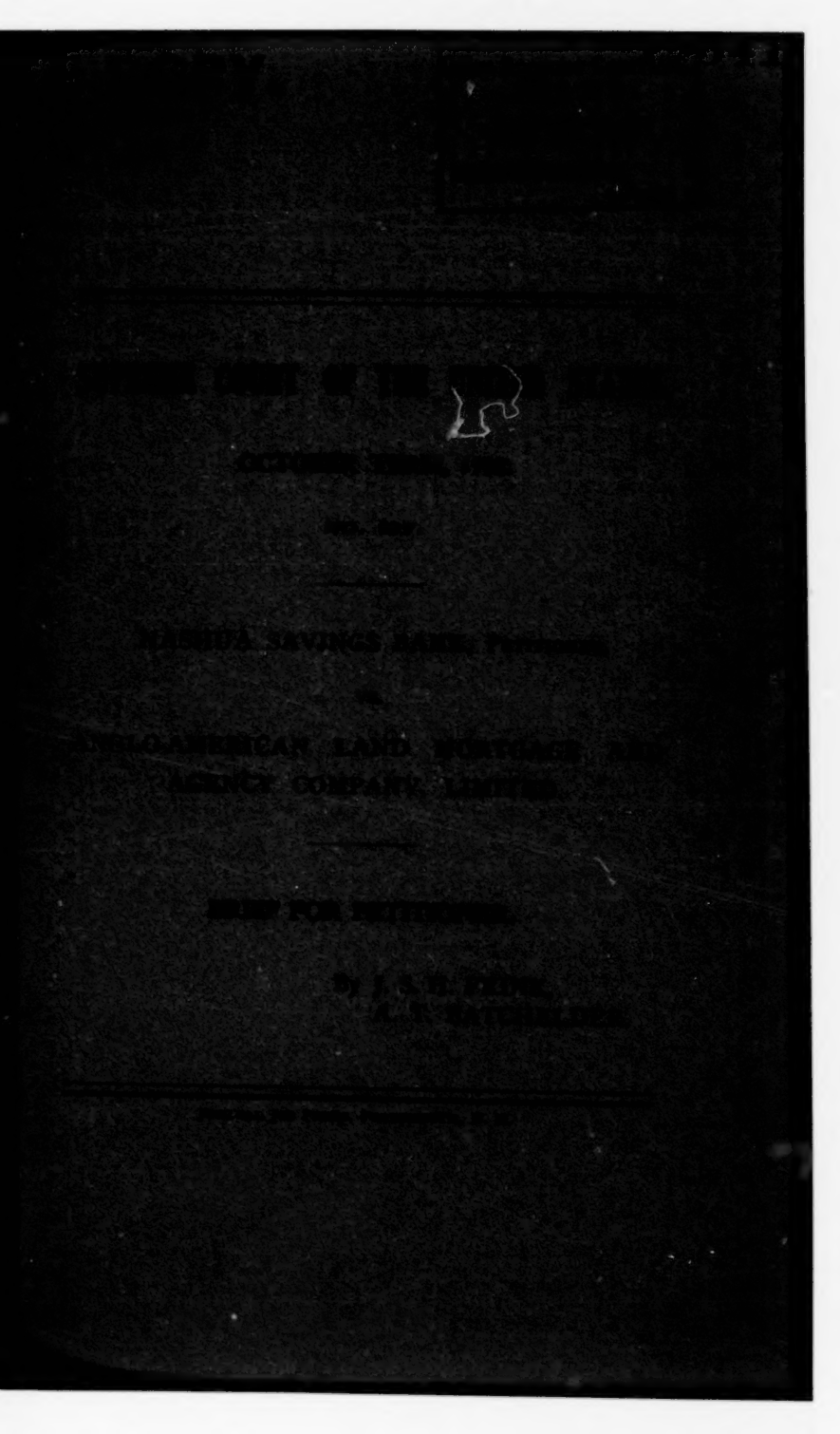
conditions or regulations shall be deemed to be a debt due from such member to the company" do not amount to an express promise.

Paragraph 16, page 18 of Record.

It is difficult to extract from these words any express promise to pay. They indicate simply the character of the obligation incurred by a call or assessment, and do not touch the manner of its enforcement. Very likely the call or assessment, independent of this provision, would be a debt, but it does not follow from that that the subscriber to stock promised to pay it in money, regardless of whether the money was necessary to the discharge of the duties and obligations of the company; nor does it follow that it agreed so waive its collection by a forfeiture and sale and promised to pay it in money.

J. S. H. FRINK,

Counsel for Petitioner.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902. No. 167

NASHUA SAVINGS BANK, PETITIONER,

vs.

ANGLO-AMERICAN LAND MORTGAGE AND AGENCY COMPANY, LIMITED.

STATEMENT OF CASE.

The petitioner is a New Hampshire Corporation. The respondent is an alien corporation, organized under the Companies act of Great Britain.

This is an action of assumpsit, brought in the Circuit Court for the district of New Hampshire, at the August term, 1896, by the respondent against this petitioner, to recover the amount of certain calls or assessments on stock in the respondent company, owned by the petitioner. The declaration is given on page 3 of the Record.

The defendant's plea was the general issue, with a brief statement of defense (Record p. 6.)

The case was tried at the May term, 1898, before the Hon. William L. Putnam, Circuit Judge, and a jury. The trial proceeded under the third count of the declaration (*Record p. 5*) as amended (*Record p. 9*) The plaintiff introduced certain evidence given in the *Record pp. 10-25.*

At the close of all the evidence Judge Putnam directed the jury to return a verdict for the plaintiff, (*Record p.* 32) which it did, assessing damages against this petitioner in the amount of $6,858.67.

On Oct. 29, 1898, a bill of exceptions was allowed, and on April 24, 1901, in the Circuit Court of Appeals by a majority opinion, the judgment of the Circuit Court was approved by Judges Colt and Brown, Judge Aldrich dissenting.

Record pp. 60-80. 108 *Fed.* 764.

By exceptions duly taken, the defendant raised, among others, the following questions :—

(1) Whether the statutes of Great Britain have been duly proved.

(2) Whether the allegations of the third count of the declaration are sufficient to state a cause of action.

(3) Whether there is any presumption of authority and regularity in favor of the acts and proceedings of a foreign corporation.

(4) Whether the New Hampshire decisions that the sole remedy is by forfeiture of the shares of stock, are binding on the Federal Court.

(5) Whether a verdict should not have been directed for the defendant for lack of evidence.

(6) Whether the action should not have been debt and not assumpsit.

PROOF OF STATUTES OF GREAT BRITAIN.

The plaintiff below claimed that the call was made in pursuance of the British Statutes, as appears by the declaration and record. The materiality of the proof of these

statutes must be conceded. We desire, therefore, to raise the preliminary question as to the sufficiency of the mode of proof adopted in this case by the original plaintiff.

In order to prove these statutes the plaintiff introduced the deposition of one Frederick H. Ramsden. The purpose of this proof appears on page 13 of the Record. Mr. Powell :

"The purpose of offering this proof is to show that we have a right of incorporation and are incorporated, and the other reason is, that the foreign statutes prescribe the liability and the rights of the stockholders."

That the testimony of Ramsden was the sole proof of statutes appears upon page 23 of the Record, and by Judge Putnam's ruling at the foot of page 35 of the Record, where he assumes that these statutes are proved by the testimony of Ramsden.

On page 47 of the Record appears under assignment of errors this exception :—

"The Circuit Court erred in admitting against the seasonable objection and exception of the (original) defendant the statutes of Great Britain, without the statutes being duly authenticated."

On page 14 of the Record will be found the ground for the exceptions to the proof of these statutes. It was that they were not proved according to the established rules of law ; because they were not authenticated under the seal of Great Britain, or by the testimony of any person who had compared them with the original enrollment ; nor by the certificate of any officer authorized to make such certificate.

It is elementary law that the statutes of Great Britain are facts, of which this court does not take cognizance without proof.

Liverpool G. W. Steam Co. v. Insurance Co., 129 *U. S.* 445.

The ordinary modes of proof are :—(1) By exemplification under great seal. (2) By certificate of an officer having authority to make it. (3) By testimony from comparison with original enrollment.

Church v. Hubbart, 2 *Cranch* 187, 238.
Emery v. Berry, 28 *N. H.*, 485.

The distinction between proof of written and unwritten foreign law is recognized in Emery v. Berry. The Circuit Court recognized the modes of proof, as above suggested, as the appropriate ones, but held that the strict rule had been relaxed in New Hampshire in

Hall v. Costello, 48 *N. H.*, 176.

It is true the mode of proving the laws of Canada, in that case, was not in strict conformity to the formal rules adopted in Emery v. Berry, but it was not relaxed sufficiently to admit the statutes of Great Britain as proven here.

Distinction Between Mode of Proof Adopted in Hall v. Costello, and in Case at Bar.

The syllabus covers what was done in Hall v. Costello. It is in these words :

"In proof of the laws of a foreign country, the testimony of any person, whether a professional lawyer or not, who appears to be well informed on the point, is competent."

In conformity to this rule, two New Hampshire lawyers having had occasion to learn from their practice what the law of Canada was, stated it, gave their sources of information, and fortified themselves by reference to the printed laws. It was not an attempt to prove the statutes of Great Britain by a copy of them, but their import by the mouth of witnesses.

In the case at bar, no such course was pursued. It became necessary for the (original) plaintiff to prove, under the plea and brief statement, (*see Record* p. 6.) not only that the company was duly organized under the law of Great Britain, but that under that law it had a cause of action ; and to lay the foundation of the proof of these laws they produce a Mr. Ramsden.

See Record, page 13.

Now if they had asked Mr. Ramsden what the laws of Great Britain were, and allowed him to have refreshed his recollection by reference to the printed statutes, they would have brought themselves within the rules in Hall v. Costello. He didn't undertake at all, of his own knowledge, to give the laws of Great Britian, written or unwritten. He says the plaintiff was a company formed under certain acts. He doesn't, as an expert even, say they had in all respects complied with the requirements of those acts. He then, without any authentication, produces what he says are copies of the acts printed by Her Majesty's printer, with the remark that *they are by law receivable in evidence without further proof*. I suppose by that latter remark he doesn't mean to testify as an expert to this court that they are receivable in evidence *here* without further proof.

That last remark is a solution of his whole testimony. He doesn't pretend as an expert to enlighten this court as to what the law of Great Britain is from his own testimony, but simply to produce certain printed or written transcripts, which he says prove themselves. This would be true in Great Britain and its dependencies, but not in a foreign country.

We adopt the idea, if not the language, of the Lord Chancellor in *Sussex Peerage Case*, 11 *Clark & F.*, 35, when he says the witness may refresh his recollection by

reference to the written law, but the proof of the law is to be from the witness, not the book.

The witness's testimony has not added a word to the copies of the statute. If it is enough to present a portion of the enactment of a foreign country, purportiug to be printed by authority, without any verification, then these statutes have been proven, otherwise not.

Beach v. Workman, 20 *N. H.*, 379, 383.

The general rule as to the proof of foreign laws is, that the law which is written, that is, statute law, must be proved by a copy properly authenticated; and that the unwritten law must be proved by the testimony of experts; that is, by those acquainted with the law.

Ennis v. Smith, 14 *How*, 400.

Pierce v. Indseth, 106 *U. S.*, 546, 551.

It would seem, in the case last cited, the state statute permitted proof very similar to that attempted by plaintiff, but it would have been inadmissible but for such statute; we repeat, no law of New Hampshire justifies it.

Supposing in a trial in New Hampshire a lawyer of Massachusetts was called to prove the corporation law of that commonwealth, and did it by presenting certain detached printed chapters of the statutes of that state, to the court or jury, without further comment than that they were printed by authority and receivable in evidence there without proof, is there any known rule of law which would jnstify such proof?

Exceptions to charge, page 51-52 of record, errors (6-7-8) cover the same objection to proof of the statutes.

Assignment of Errors as to Pleading.

On pages 50-51 of the printed Record, under divisions 1 to 9 inclusive, appear certain exceptions to the declara-

tion in this case. The declaration upon which the trial proceeded is as follows :—

"And also in a further plea of the case for that the said defendant heretofore, to wit, on the second day of December, A. D. 1895, at said London, to wit, at Nashua, in the State of New Hampshire in the United States of America, was further indebted to the said plaintiff in a large sum of money, to wit, eight thousand dollars for a certain call and assessment made by said company in pursuance of its charter and by-laws, at said London, to wit, on the tenth day of July, A. D. 1895, and to be paid on the second day of December, A. D. 1895, upon the defendant's subscription to and ownership of a large number, to wit, one thousand shares at ten pounds sterling each, to wit, fifty dollars each of the capital stock of said company, which subscription had theretofore been made and subscribed in due form by said defendant, to wit, at Nashua, and of the said assessment and call the said defendant had notice at Nashua in the State of New Hampshire, heretofore, to wit, on the second day of December, A. D. 1895, and thereafter, to wit, at said Nashua, on the second day of December, A. D. 1895, in consideration thereof, the defendant then and there promised the plaintiff to pay said sums on demand with interest at the rate of seven per cent. per annum from the time the same became due and payable as aforesaid. Yet though often requested, the defendant has never paid said several sums of money, or any of them, but has neglected and refused so to do."

This action is brought by a foreign company to enforce a foreign contract. The court is presumed to be in absolute ignorance of the laws of Great Britain. The law of Great Britain, since the Declaration of Independence, is the law of a foreign country, and, like any other foreign law, is a matter of fact, which the courts of this country cannot be presumed to he acquainted with, unless it is pleaded and proved.

The rule that the courts of one country cannot take cognizance of the laws of another without *plea* and proof,

has constantly been maintained at law and in equity in England and America.

Bank of North America v. Rindge 154 *Mass.*, 203.
Hancock Nat. Bank v. Ellis, 166 *Mass.*, 414, 419.

Now let us examine the declaration. It avers that the call and assessment were made under the charter and by-laws of this foreign corporation. The charter was a foreign law, and the by-laws a regulation of a foreign company. The burden was on this foreign company to show by its pleadings that its charter authorized this call or assessment, so that upon inspection of the pleadings it should appear that the call was prima facie legal.

This being an action by a foreign corporation under a foreign contract, we claim that there is no presumption of the regularity of the proceedings as in the case of domestic corporations, but everything necessary to give a cause of action must be *pleaded* as well as proved. They should therefore have alleged enough of their organic law, as well as of the regulations to show a prima facie right, at least, to make the call sued on.

We find, then, an averment in the declaration, that the assessment was made at London in pursuance of the *charter and by-laws* of said company. This contract by universal opinion is to be governed by the laws of the place where it was made. It seems to us, that the authority to lay this assessment being derived from foreign laws, and this contract being construed by foreign laws, the rules of good pleading require that the terms of the charter and by-laws giving authority to make the assessment should have been specificably set forth. So, too, if an express promise is necessary to support this action, it should have been averred. If an implied promise will support it, then the laws of the country where the con-

19546

tract was made, giving a cause of action against a stockholder for an assessment upon an implied promise by reason of his relation to the corporation, should have been alleged.

Necessity of Evidence of an Express Promise Under Laws of New Hampshire.

On page 22 of the Record, it appears that the plaintiff introduced no evidence whatever :—

(1) that the plaintiff was insolvent at the time of making the calls or assessments, or at the time of bringing the suits.

(2) or that the calls were made for the benefit of auditors or payment of debts.

(3) that no promise, express or implied, to pay such assessments, other than that arising from the retention of the certificate of stock by defendant, the articles of association, and rules and regulations referred to in said certificate of stock, and the statutes of Great Britain.

Defendant's exceptions cover the neglect of the plaintiff to prove these several propositions. See pages 51 of Record and divisions 10, 11, 12 and page 57, divisions 27, 28, 29.

Now we submit, that in the absence of any proof that this call was made for the payment of debts or other obligations of the plaintiff corporation, or that the suit was instituted or carried on for the benefit of creditors, there can be no recovery in the absence of an express promise to pay. The cases in the United States courts, which seem to announce a contrary doctrine, are where the action is brought by an assignee of an insolvent corporation to recover an unpaid subscription, and proceed upon

the theory that such a subscription is a trust fund for the payment of corporate debts.

Upton v Trebicock, 91 *U. S.*, 45.

Webster v. Upton in the same volume, page 65, is simply an affirmation of the rule of law, that an assignee in bankruptcy can maintain an action for the unpaid balance due on stock subscription without an express promise.

In those cases no remedy was provided by forfeiture and sale as, in the case at bar.

The case of Chubb v. Upton 95 *U. S.*, 665,

is based entirely upon the last two cases referred to.

These cases differ from the one under consideration, inasmuch as they were suits brought by an assignee in bankruptcy to recover moneys due on unpaid subscriptions, to pay the creditors of the corporation, and it does not appear that their charters or articles of association contained any provision for forfeiture or sale of shares. The charge of Judge Putnam and the exceptions show that there was no evidence in the case to show what the law of Great Britain is upon this subject; whether the remedy by sale and forfeiture must first be resorted to or not. The right to declare a forfeiture of the shares is reserved. Sec. 17-18-19-20, page 25 of Record. This appears in the articles of association which are or may be denominated as the by-laws of the corporation.

The law of England, if we know what it was, would be conclusive upon this subject.

Our contention may be thus succintly stated :—

(1.) That plaintiff offered no evidence as to what the law of Great Britain is to collect calls or assessments, in the absence of an express promise to pay, and without evidence of the necessity of such calls or assessments to

pay debts, when the articles of association provide for a forfeiture of stock.

(2.) There being no evidence as to the law of Great Britain, the court must assume that the law of Great Britain in this behalf is the same as that of New Hampshire.

(3.) The law of New Hampshire declares that no such action can be maintained.

The law of England bears the same relation to the courts of the United States that the laws of one of the United States do to the courts of another state of the Union, and we only suggest this because we desire to make an extract from a state case showing the rule as to burden of proving foreign laws, and the presumptions in the absence of such proof.

"Where a question of the law of another state (foreign country) is in controversy, the party upon whom the burden lies will fail unless evidence is produced to sustain his view ; and statutes and decisions which were not put in evidence at the trial cannot be used the first time at the argument of the case before us for the purpose of proving the law of such state (foreign country)."

"In the absence of anything to show the contrary, there is a presumption that the common law of another state (foreign country) is like that prevailing here."

Kelley v. Kelley, 161 *Mass.*, 111, 114.

"Contracts made in a foreign country, in the absence of evidence of what their legal effect would be in the place in which they were executed, receive the same construction and have the same effect as if they were executed in the place where the action to enforce them is brought."

Whidden v. Seelye, 4 *Maine*, 247,

and many other cases.

Whether an action of assumpsit or debt would lie in Great Britain to enforce this assessment or call, or wheth-

er there must be proof of its necessity, or whether remedy must be had by forfeiture and sale in the first instance, or exclusively, the plaintiff has offered no evidence; Great Britain being an alien country, the burden was on plaintiff to prove its laws.

Liverpool Steam Co. v. Phœnix Ins. Co., 129 *U. S.* 397, 445.

Pierce v. Indseth, 106 *U. S.* 546, 551.

What is the law of New Hampshire in this behalf? The cases declaring the law of New Hampshire are long continued and uniform.

The rule is thus stated by Judge Woodbury, for many years a justice of the supreme court of the United States, as a principle of common law:

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But it is said that this court is not bound to follow the decisions of New Hampshire, the question involving principles of general law. No reason appears why this court should not follow the law as administered in New Hampshire, and there are potent reasons why it should.

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13548

arising from, or concerning, the usages of commerce. None of the reasons urged in *Railroad Co. v. Bank*, 102 *U. S.* 14, 58, for a uniformity of decisions in transactions of a commercial character apply here.

But there are no Federal decisions contravening the New Hampshire cases, and if none, the Federal courts will learn, even in matters of general jurisprudence, with the views of the state courts.

Burgess v. Seligman, 107 *U. S.*, 20, 34.

The recent case of *Mandell v. Swan Land & Cattle Co.*, 154, *Ill.* 177, deals somewhat with this subject, but we have been unable to derive from it any very valuable conclusions.

HAS THERE BEEN ANY EXPRESS PROMISE TO PAY?

The defendant, in support of its contention, relies upon the following clause (Sec. 16) in the general act under which the company was organized.

"All monies payable by any member to the company, in pursuance of the conditions and regulations of the company, shall be deemed to be a debt due from such member to the company."

Record p. 15.

It is difficult to extract from this clause a promise to pay. Undoubtedly the assessment, if properly laid, would create a debt, and there may be an implied promise from the character of the obligation to pay it, as there is on the part of anyone to pay his debts, but that does not answer the requirements of the law as administered in New Hampshire. It must be an express promise to pay, to render the stockholder liable under the decided cases of that state.

As the plaintiff has not given us the benefit of the law

of England in this behalf, we must assume it to be the same as the New Hampshire law.

In the recent case of *Anglo-American Company v. Dyer* in Massachusetts 64 N. E. 416, the court assume that this clause creates an implied promise, but not a direct one. The court in that case was not dealing with the law of New Hampshire as declared by its highest tribunal.

EXCEPTION TO REFUSAL TO DIRECT VERDICT FOR WANT OF EVIDENCE.

The action proceeded before a jury, but at the close of the testimony a verdict was directed for the plaintiff. To this direction exception was taken, as appears upon page 50 of the Record.

It is said that the Record does not say categorically, that the evidence appearing there was *all* the evidence in the case, and hence this court will not determine the question of sufficiency of evidence.

This defence cannot prevail, because the record does show that, upon what we regard as essential propositions, all the evidence, or want of evidence, bearing upon them is recited. Thus on pages 22 and 23 of the printed Record it appears that the statutes, memorandum and articles of association, certificate of stock, and Mr. Ramsden's testimony, constitute all the evidence bearing upon plaintiff's incorporation and organization.

Moreover, on page 11 of the Record, appears the recital that the plaintiff thereupon proceeded to "introduce the following evidence." The fair inference from this statement is, that the evidence thereafter recited was all that the plaintiff did introduce.

U. S. v. Copper Queen Mining Co., 185 *U. S.* 495.

But whatever view the court may take of this proposition. this case does not stand as one tried by a jury with a general verdict. The presiding justice has directed a verdict, and given his reasons for the "faith that is in him." He has stated the facts which he claims in his opinion were proven, and upon which he bases his direction for a verdict.

We say they are insufficient to sustain a verdict. As we understand them, the facts are :—

(1.) The production of the certificate of stock by defendant upon request, as evidence that defendant is a stock holder.

Record p. 35.

(2). The testimony of Ramsden.

(3). Statutes of Great Britain.

(4). Posting notice of call, and mailing same.

(5). Habitat of plaintiff corporation.

(6), Decisions of New Hampshire.

(7). Presumption of obligation to pay from delivery and acceptance of stock.

(8). No proof whether corporation has ceased to do business, or is in active operation, or owed debts, or whether call is necessary to pay debentures. *Record p.* 40,

(9). Extract from Statutes of Great Britain, Sec. 16.

(10), Form of action.

Now we submit that the burden was on the plaintiff, not the defendant, to prove the regularity and necessity of these calls or assessments, and there was no evidence, as appears by the charge of the court, upon these topics.

The law in this behalf, we apprehend, stands differently, in the case of a foreign or international, and a domestic corporation. It is seemingly settled that there is a presumption that the acts of a domestic corporation are regular and legal, and bind the stockholder. Of course, it is a

work of supererogation to call the attention of this court to this statement of the law.

We have been unable to find any case of the Supreme Court where this question has been directly raised. There may be such, but that we have not found them, is all that we can say. Reasoning, then, from general principles and analogy, we come to the conclusion that the regularity of the proceedings of a corporation of another country must be proven.

There was an entire absence of evidence as to whether such presumption prevails in the case of an alien corporation proceeding to enforce an assessment, or call, made under the laws of another country, in the courts of England. Nor was there any evidence even as to whether such presumption prevails there, under its own companies act, although if there was, it might not affect our consideration of this matter.

There seems to be a principle of reciprocity attending the administration of the laws of an alien country, which would, as a matter of international comity, induce our country to give the same weight to these acts, that they give to ours.

Hilton v. Guyot, 159 U. S. 113.

It seems to us that unaided by the presumption of regularity as to the manner and purpose of this assessment, the plaintiff has not sustained his case upon the facts found by the presiding Judge. If the presumption that prevails in behalf of the preceedings of a domestic corporation does not prevail, the burden certainly was on the plaintiff to prove that the assessments were made for some lawful purpose. The charge of his Honor, Judge Putnam, as well as the exceptions show that no such proof was made.

In Mandel v. Swan Land & Cattle Co., 154 *Ill.* 177, 40 *N. E.* 462, the court distinguishes between acts done under the organic law, and acts done under the by-laws, of an alien corporation, as to their effect upon a stockholder. The articles of association appearing on pages 19 and 20 of the Record are the by-laws of the company. It is these articles that disclose the authority of this company to order assessments or calls.

Sec. 9, Record, p. 20.

Just why this authority was given, by subsequent resolution, and amendment, does not appear. Very likely it was the purpose of this corporation, when it placed its stock in the American market, to limit the amount of its calls.

EXCEPTIONS TO CHARGE TO JURY BY JUDGE PUTNAM.

Many of these exceptions are but a reiteration of these already discussed, but we desire to call the attention of this court to several others, which we think may state the law incompletely or inaccurately.

It is sometimes difficult, as said by the court in *Hoadley v. Northern Transportation Co.*, 115 *Mass.*, 304, 307, to determine whether the rule sought to be applied touches the remedy or the contract. We find some difficulty in determining the question in this case, as to whether the collecting of this assessment, by sale and forfeiture, or proceeding at law, applies to the contract or the remedy. If to the remedy, then surely the law of New Hampshire must prevail.

Now on Page 53 of the Record it appears that Judge Putnam enunciated a correct principle of law when he said that he must be governed by the laws of Great

Britain so far as they are shown in the case, and that so far as they were not shown, he was bound to assume they were the same as the laws of New Hampshire. So far, there can be no exception, but we did and do except to his further statement and application of it, that with reference to a question of general character he was not bound by the decisions of the court of New Hampshire, excepting so far as they commended themselves to his judgment.

The language of this charge may in a general way be correct, but the application of it, as appears on page 55, in which he states that the doctrine of the New Hampshire cases is contrary to the ordinary principle of law, and hence does not govern this case, we think is erroneous.

What are questions of general law it is pretty difficult to determine. Questions concerning usages of commence are supposed to be, but it does not occur to us, that a question as to the mode of enforcing an assessment under the laws of a state of the Union where the proceeding is pending, is one of general law, or general interest. It is special, not general.

The instruction or statement, on page 55 of the Record, that the delivery and receipt of shares of stock implies a promise to pay a call or assessment, is diametrically opposed to the law of New Hampshire.

Railroad v. Johnson, 30 *N. H.*, 390.

Company v. Burlingame, 67 *N. H.*, 301.

Shattuck v. Robbins, 68 *N. H.*, 565.

On page 56 of the Record, Judge Putnam, in discussing the form of action, said: "If this case was at common law and based on common law principles, there would be no question that this is the right form of action. Therefore, inasmuch as in my view this suit can be maintained on

common law principles, and independently of the statutes of Great Britain, &c." For further illustration of this remark, it is only fair to call attention to its connection with the rest of the charge on page 42 of the Record.

It appears in the declaration (Record, p. 5,) that this assessment was made in pursuance of the company's charter and by-laws. This was a material allegation. Judge Putnam (Record, p. 42,) predicates the right of plaintiff to recover on the words of the statute, that "all monies payable by any member of the company to the company in pursuance of the conditions and regulations, shall be deemed to be a debt due from such member to the company, and in England and Ireland to be in the nature of a specialty debt."

Record, p. 15.

It was error, therefore, it seems to us, to hold that this action could be maintained on common law principles, and independently of the statutes. At all events, if it could, the plaintiff did not attempt it, but relied on the statutes as averred.

The common law rule of pleading prevails in New Hampshire, excepting so far as modified by the statute allowing a defendant to file a brief statement of defence under the general issue, instead of a special plea. We have the law of England that this is a specialty debt, in the place governing this contract. By the law of New Hampshire no action can be maintained without a special promise to pay this assessment, so the law of England must prevail in this behalf, if there can be any recovery at all. The remedy to enforce a specialty debt, wherever the common law rules of pleading prevail, is debt.

On page 56 of the Record, it appears that the court said:

"It is not really maintained by the defendant that

there is any evidence here that the particular call or assessment in issue has been paid. And it is of no sort of consequence, so far as this case is concerned, what happened about other calls or assessments. If the defendant had paid this call, it is for the defendant to show it, and to overcome, by some evidence, the implication arising from what appears on the certificate of stock, that a large percentage of the par value of this stock has not been paid. The burden is upon the defendant to show that this particular assessment in issue has been paid."

To this ruling exception was duly taken (Record, p. 56.)

Of like tenor with this suggestion, is the ruling of the court, appearing on page 24 of the Record, admitting a part of the record of registry of members, accompanied by the remark that if the entire record were here, he should not allow anything else to be read.

We assume the law to be that when the stockholders are asked to pay the balance of the subscription upon call or assessment, there is an implied condition that the call shall be made upon all the shareholders alike. In this view of the law, the general statement of the Circuit Judge, and the admission of the partial record, were errors.

The rest of the record showing a registry of the other stockholders, and their status with the Company, would have had a tendency by comparison to prove (if the fact was so) the irregularity of this call, and to have enabled the defendant to have laid some foundation for a further investigation of the fact, whether this call was general, or only special. We suppose there can be no doubt that if this stock was subject to a call for one pound each from time to time, at the discretion of the directors, and an assessment of two pounds each was laid upon the British stockholders only, and five pounds each on the American stockholders, no suit would be entertained for a recovery of such unequal assessment, against the latter.

The partial enquiry to which the evidence was limited, subject to defendant's exception, gave no opportunity to investigate the fairness of the calls in this particular.

We think that all the propositions that we have briefly discussed are fairly covered by our bill of exceptions. Of course they were taken and stated hastily during the progress of the trial, and upon more careful consideration might be expressed in more exact terms, but by fair intendment they state the objections we are here urging.

It is said that the remarks of the learned judge in directing a verdict were merely a personal explanation of his views of the law and facts that led him to take that course, and not subject to exception. If he has directed a verdict upon an erroneous view of the law and facts, it is difficult to see upon proper exception why we cannot claim relief from his errors. If not, the defendant would seem to be remediless as against errors which were the very basis of a wrong verdict.

The general proposition as to the duty of an alien corporation to establish the regularity of its organization and corporate acts, without the aid of legal presumptions, as a condition precedent to the maintenance of an action of this character, has been stated with great clearness and vigor of language by Judge Aldrich in his dissenting opinion. It is almost invidious to select any passages from this able opinion for the consideration of the court. We cannot repeat,—we have not the ability to express our views of the insufficiency of evidence in the case to justify a verdict, so ably and satisfactorily as they have been stated by this able jurist.

We can only commend them to the consideration of this court.

J. S. H. FRINK,
A. T. BATCHELDER,

No. 415 Sup. Ct. 1901

Brief of Powell for Respondent

NOV 4 1901

JAMES H. MCKENNEY

Supreme Court of the United States,

OCTOBER TERM, 1901.

Filed Nov. 4, 1901.

No. 415.

NASHUA SAVINGS BANK,

Petitioner,

vs.

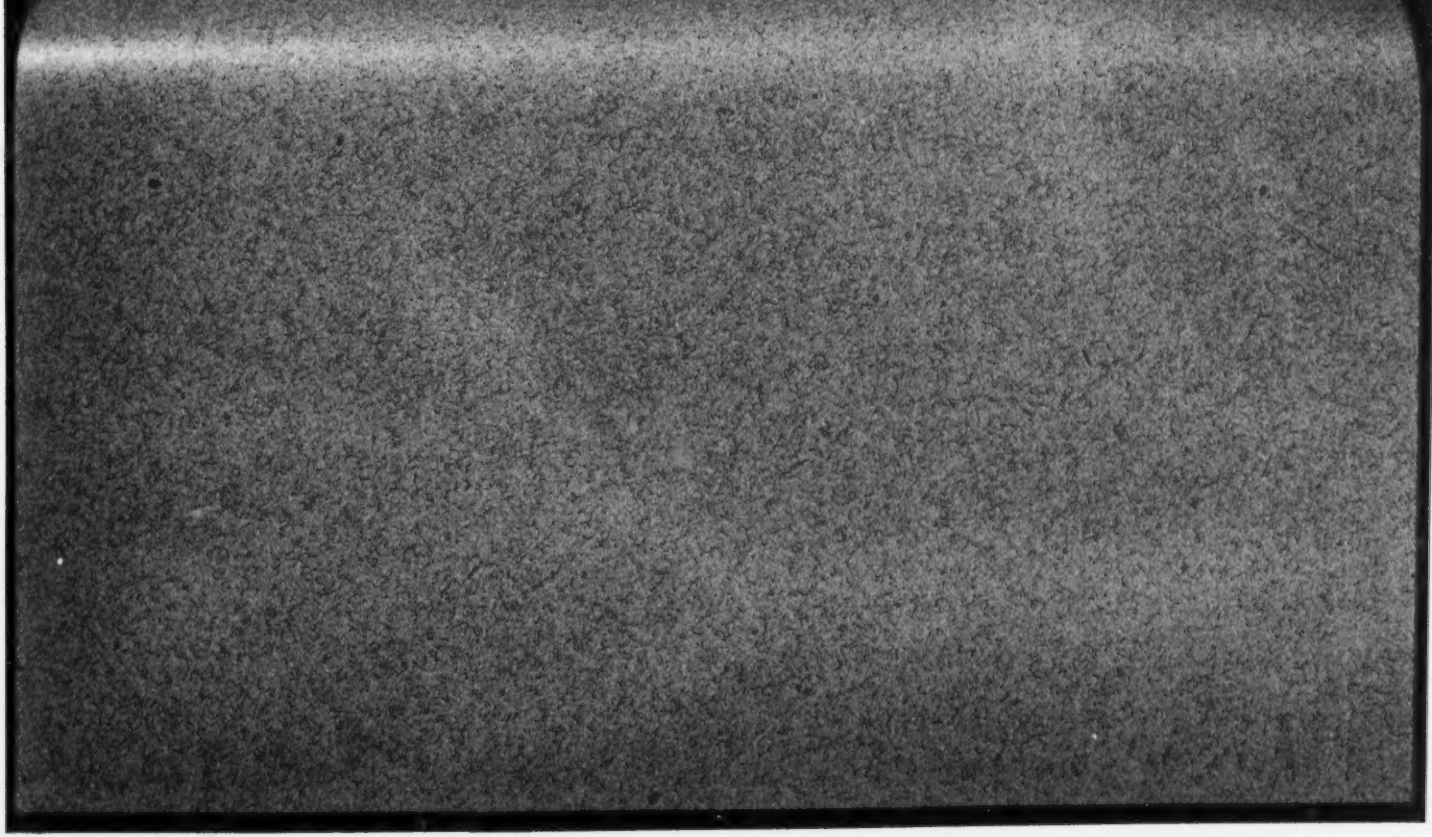
ANGLO-AMERICAN LAND MORTGAGE AND AGENCY COMPANY, Limited,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OMAR POWELL,
GILBERT A. DAVIS,
DANIEL L. CADY,
Counsel for ~~*Petitioner.*~~ Respondent.

NEW YORK:
APPEAL PRINTING CO., 14-16 VESEY STREET.
Telephone, 192 Cortlandt.
1901.



The Supreme Court of the United States.

OCTOBER TERM, 1901.

NASHUA SAVINGS BANK,
Petitioner,

vs.

ANGLO-AMERICAN LAND MORTGAGE AND AGENCY COMPANY, LIMITED,
Respondent.

Brief in Opposition to Petition.

Statement of Questions Raised.

Counsel for petitioner presents in his brief five points upon which he asks the review of this Court:

I. (p. 3.) That the Circuit Court of Appeals "*erred in refusing to consider the question as to whether the Circuit Court should or should not have directed a verdict.*"

II. (p. 4.) "*That the evidence of record can not support the verdict unless aided by the presumption that the proceedings in the organization of this foreign company and in laying the assessment, were regular, legal and for a lawful purpose.*"

III. (p. 6.) Whether "*the Statutes of Great Britain were proved according to the established rules of law.*"

IV. (p. 9.) "*The defective or insufficient statement of plaintiff's case in the declaration.*"

V. (p. 10.) Error "*in holding that this action could be maintained in the New Hampshire District without evidence of an express promise.*"

Respondent contends that the petition should be denied, because:

(1) The Circuit Court of Appeals decided these points correctly.

(2) The record is so fragmentary and defective that only one question (of evidence) is presented.

(3) There are no open questions of *gravity* or *importance* calling for a review of this Court.

Answering petitioner's first point (p. 3), we say:

Whether the Trial Court erred in directing a verdict for plaintiff, and in refusing a direction for defendant below, requires a consideration of *all* the evidence introduced upon the trial. As the record does not contain all the evidence, nor purport to contain all the evidence, the point must be dismissed.

See opinion of Court below, and

City of Providence vs. Babcock, 70 U. S., 240-244.

Texas & Pacific R. R. Co. vs. Cox, 145 U. S., 593-606.

Hansen v. Boyd, 161 U. S., 397.

Yates vs. United States, 90 Fed. Rep., 57-62.

The argument of counsel (p. 3 of brief) that the statement "*the plaintiff introduced the following evidence*" imports that what follows is all the evidence, is neither logical nor in accord with the decisions of the Federal Courts.

Upon appeal the presumptions are that the proceedings below were regular, and that the evidence supported the verdict. Hence, on questions going to the sufficiency of the evidence it must be *affirmatively* shown that the record contains all evidence.

Answering petitioner's Second Point, (p. 4,) we say:

Whether the evidence *of record* supports the verdict is immaterial. The verdict was based, not upon the evidence in this record, but upon the evidence produced on the trial, and as that evidence is not all [redacted] before the Court, this point is not open for consideration.

The argument of Judge Aldrich is unwarranted where, in his dissenting opinion (p. 5), he contends that the statement in the record (p. 27), "*The statutes, memorandum* and *articles of association, certificate of stock, and Frederick Herbert Ramsden's testimony constitute all the evidence bearing upon the question of the plaintiff's incorporation and organization,*" must be construed as meaning that all the evidence is in the record.

The statement is not that *all* the statutes are in the record, or that *all* Articles of Association are in the record, or that *all* Ramsden's testimony is in the record. The English Statutes were fully proved. Many sections were read. Ramsden's testimony was voluminous, going directly to the regularity of the call and its necessity. Surely

counsel cannot ask this Court to decide what presumptions are applicable, without showing the evidence upon which the presumptions must be predicated.

Presumptions of fact are based upon the state of the evidence as a whole. See 2 Wharton Ev., Sec. 1226.

Upon the trial at Circuit the statutory authority to make calls are shown. Some of this evidence is in the record (pp. 18-24). The making of calls under the authority of these Statutes and the Articles of Association was fully shown. The regularity, legality and lawful purpose of the calls was proved.

Counsel for the petitioner goes outside of the record (p. 5 of his brief) where he says: "The evidence in the case at bar, as has been said in the dissenting opinion, consists entirely of some (we say irregular) proof of the English Statutes, the Articles of Association and the call and notice of it." If he had put all the evidence in the record he would have shown more fully the deposition of Hildebrand Ramsden, (see record, p. 15) and the evidence in open Court of the Treasurer of the Nashua Savings Bank, upon these very points, showing calls made in the manner laid down by the English Statutes and the Company's Articles of Association, and that notice thereof was received by the Bank and produced in Court by it (see record, p. 43).

As this Court will not consider the statements of counsel *pro* and *con* as to what the evidence not in the record showed, we desist.

Counsel's contention (p. 5 of his brief) that as foreign judgments are impeachable, the acts of foreign corporations should also be impeachable, may be a good statement of law.

The defendant below had the right to attack the

acts of the plaintiff company by showing fraud or other illegality, but nothing of the kind was either alleged or proved (record, pp. 42-43).

Upon the question of presumptions of regularity of the proceedings of private corporations, Justice Story in Bank of the United States vs. Dandridge (12 Wheat., p. 70), said:

> "The same presumptions are, we think, applicable to corporations. Persons acting publicly as officers of the corporation, are to be presumed rightfully in office; acts done by the corporation, which presuppose the existence of other acts to make them legally operative are presumptive proofs of the latter. Grants and proceedings beneficial to the corporation are presumed to be accepted; and slight acts on their part, which can be reasonably accounted for only upon the supposition of such acceptance, are admitted as presumptions of the fact. If officers of the corporation openly exercise a power which presupposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed. If a person acts notoriously as cashier of a bank, and is recognized by the directors, or by the corporation, as an existing officer, a regular appointment will be presumed; and his acts, as cashier, will bind the corporation, although no written proof is or can be adduced of his appointment. *In short, we think* that the acts of *artificial persons afford the same* presumptions as the acts of natural persons. Each affords pre-

> sumptions, from acts done, of what must have preceded them, as matters of right or matters of duty."

In speaking of foreign corporations, this Court, in Relfe v. Rundle (103 U. S., 222–226), said:

> "Every corporation necessarily carries its charter wherever it goes, for that is the law of its existence. It may be restricted in the use of some of its powers while doing business away from its corporate home, but every person who deals with it everywhere is bound to take notice of the provisions which have been made in its charter for the management and control of its affairs both in life and after dissolution."

Canada Southern R. R. Co. vs. Gebhard (109 U. S., 527), is directly in point.

Upon the impeachability of foreign judgments see Hilton vs. Guyot (159 U. S., p. 188), where the Court said:

> "The rule is that the foreign judgment is to be received, in the first instance, as *prima facie* evidence of the debt; and it lies on the defendant to impeach the justice of it, or to show that it was irregularly and unduly obtained."

Answering petitioner's Third Point (p. 6) we say:

That the witness Ramsden (Record, pp. 15, 16) qualified himself as an attorney at law and entitled to speak as to what the English Statute Law is, cannot be doubted. His competency is not questioned in petitioner's brief.

Did he sufficiently authenticate the Statutes produced?

He testified:

That the Statutes produced were "*issued by authority, being printed by Her Majesty's printer, and are, as such, by law receivable in evidence without further proof.*"

This being an action at law, the rules of evidence within the State of New Hampshire prevail (Rev. St., Sec. 721; Connecticut Mutual Life Ins. Co. vs. Union Trust Co., 112 U. S., 250-255).

Upon the trial Judge Putnam allowed the testimony upon the authority of Hall vs. Costello (48 N. H., 176; see Record, p. 42). In that case the facts were that two New Hampshire attorneys went to Canada, where upon inquiry they learned what the Canadian law was upon the matter in issue. On their return home they were allowed to testify orally as to what the Canadian law was. As the New Hampshire Courts are so liberal in holding that attorneys who made a visit to a foreign country and upon inquiry ascertain from attorneys there what the law is will be held to have qualified themselves to speak as to what foreign law is, certainly the testimony of an attorney educated and practicing under the law of the foreign country is better qualified.

If the witnesses in Hall vs. Costello had brought home with them Statutes of Canada it certainly cannot be that the Statutes so produced would be less competent than their oral testimony.

The Court below (p. 2) held that these Statutes were sufficiently authenticated and we refer to their opinion and the authorities there cited.

If the decision of cases outside of New Hampshire be pertinent, we submit the following:

> An expert or other credible witness may testify as to the official or authoritative character of the printed volume of foreign law

produced. (Pacific Gas Company vs. Wheelock, 80 N. Y., 278; and Dundee Mortgage, Trust and Investment Company vs. Cooper, 26 Fed. Rep., 665.)

From an examination of authorities, we find that both modes have been sanctioned (see Barrows vs. Downs, 9 R. I., 446).

One of the best considered cases upon this subject is The Pawashick, 19 Fed. Cases, 5 (#10851) (2 Lowell, 142), where Judge Lowell (p. 8) held that books of "acknowledged or ascertained authority" were competent proof of English law, and that "an oath is not necessary in all cases." Again on the same page he asks: "Whether the idle, unnecessary and obsolete mode of verification should be insisted upon?" Further (on the same page) he says that the law of England can be proved book by books and experts.

In Jones vs. Moffit, 5 S. & R., 523, a copy of the Irish Statutes sworn to by a barrister as having been received from the King's Printer, was held competent.

In Lacon vs. Higgins, 3 Stark, 178, Abbott, C. J., admitted a copy of the French Code produced by the French Consul, who swore that the copy produced was used and acted upon by him. This copy purported to be printed by the Royal French Printers, where the French Laws were printed.

In Merrifield vs. Robbins, 8 Gray, 150, the Statutes of Vermont having printed on the title page "By Authority" was held to purport publication by the Government of Vermont and competent.

There is no New Hampshire Statute on this subject. Counsel does not argue and it cannot bo seriously doubt·d that Ramsden has shown

the Statutes produced to be the officially printed Statutes of England. We submit that the Statutes produced were verified by the oath of the witness. The evidence carried upon its face verity and certainty, equal if not greater than is usually required of a witness in proof of facts.

There is no reason for a more strict rule. Authentication is a question for the Court. The English law is an open book to Judges and Lawyers. Our libraries are filled with English text books, reports and Statutes. The Courts are continually citing them in their opinions. When a Judge will take a book from his library shelf, cite it in his opinion as a decision of the English Courts and follow it as an authority, why should an Attorney do more than present the same book and swear that it is an official print.

This is at most a question of practice. As the Federal Courts have adopted the state rules of evidence, it is of local application only, and presents no question of general importance.

Upon petitioner's Fourth Point (p. 9 we say:

The sufficiency of the statement of plaintiff's case in the declaration was not raised by the motion to direct a verdict for the defendant below. If the sufficiency of the declaration had been raised, the Trial Court could have ordered it amended so as to conform to the proofs.

The question, however, is not reversible Rev. St., Sec. 954, provides that "no writ * * * declaration * * * judgment * * * shall be * * * reversed for any defect or want of form," etc. See also opinion of Court below (p. 4) upon this point.

Upon petitioner's Fifth Point (p. 10) we say:

Proof of an *express promise* was unnecessary as defendant was liable as a stockholder upon the implied promise of all stockholders to pay up to the par value of the stock (See Record, pp. 46, 47, 48, and authorities there cited).

Again we must refer to the fact and say that this question cannot be decided as all the evidence as to promise is not in the record. The statement in the record (p. 26) does not mean that all the evidence of promise was in the record.

Counsel's chief point, however, is that under the New Hampshire decisions there must be an express promise to pay. There is no New Hampshire Statute upon this subject, and where counsel refers to the "Laws of New Hampshire" he has in mind the common law as interpreted by that State. The Common Law is in theory the same in all States. While the State Courts may place upon it different interpretations the Federal Courts will not be bound thereby, but will exercise an independent judgment.

On questions of stockholder's liability, this Court has already expressed itself.

> In Webster vs. Upton, 91 U. S., 69, this Court said: "If its intention was that the whole capital might be called in, it is difficult to see why the subscriber, knowing the intent, does not impliedly engage to pay in full for shares when payment is required."

1 Angell & Ames on Corp., § 534.
Redfield on Railways, 53.
Pullman vs. Upton, 96 U. S., 328.
Fenn vs. Brown, 142 U. S., 56.
Chubb vs. Upton, 95 U. S., 665.

In Upton vs. Tribilcock, 91 U. S., 45–48, the Court sai l:

"The acceptance and holding of a certificate "of shares in a corporation make the holder "liable to the responsibilities of a sharehold- "er."

"A promise to take shares of stock imports a promise to pay for them (Palmer vs. Lawrence, 3 Sandf., Sup. Ct., N. Y., 161). An acceptance and holding of a certificate has the same effect * * *" (see also 2 Thompson on Corp., § 1568).

Kinds of Cases Reviewable on Certiorari.

In Lau Ou Bew Petitioner, 141 U. S., 583 and again, in Forsyth vs. Hammond, 166 U. S., 506, this Court laid down the rule that it would review the Circuit Court of Appeals only "when questions of gravity and importance were involved."

While attorneys may not with certainty anticipate in any particular case what this Court would hold to be a question of "gravity and importance" we find that in *ex parte* Woods, 143 U. S., 202, it was held that whether the Circuit Court properly construed a State Statute upon a question of practice or properly applied the rule of law governing a servant's right of recovery against his master for injuries, did not fall "within the category of questions of such gravity and general importance as to require review." So we say here that the record is so defective that it only presents the question whether the English Statutes were proved according to the New

Hampshire rules of evidence. This question is local and not of general importance.

We also insist that the Circuit Court of Appeals decided correctly.

Respectfully submitted,

OMAR POWELL,
GILBERT A. DAVIS,
DANIEL L. CADY,
Counsel for Respondent.

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JAN 27 1903

JAMES H. MCKENNEY
Clerk.

Supreme Court of the United States.

OCTOBER TERM 1902.

No. 167.

NASHUA SAVINGS BANK,
PETITIONER,

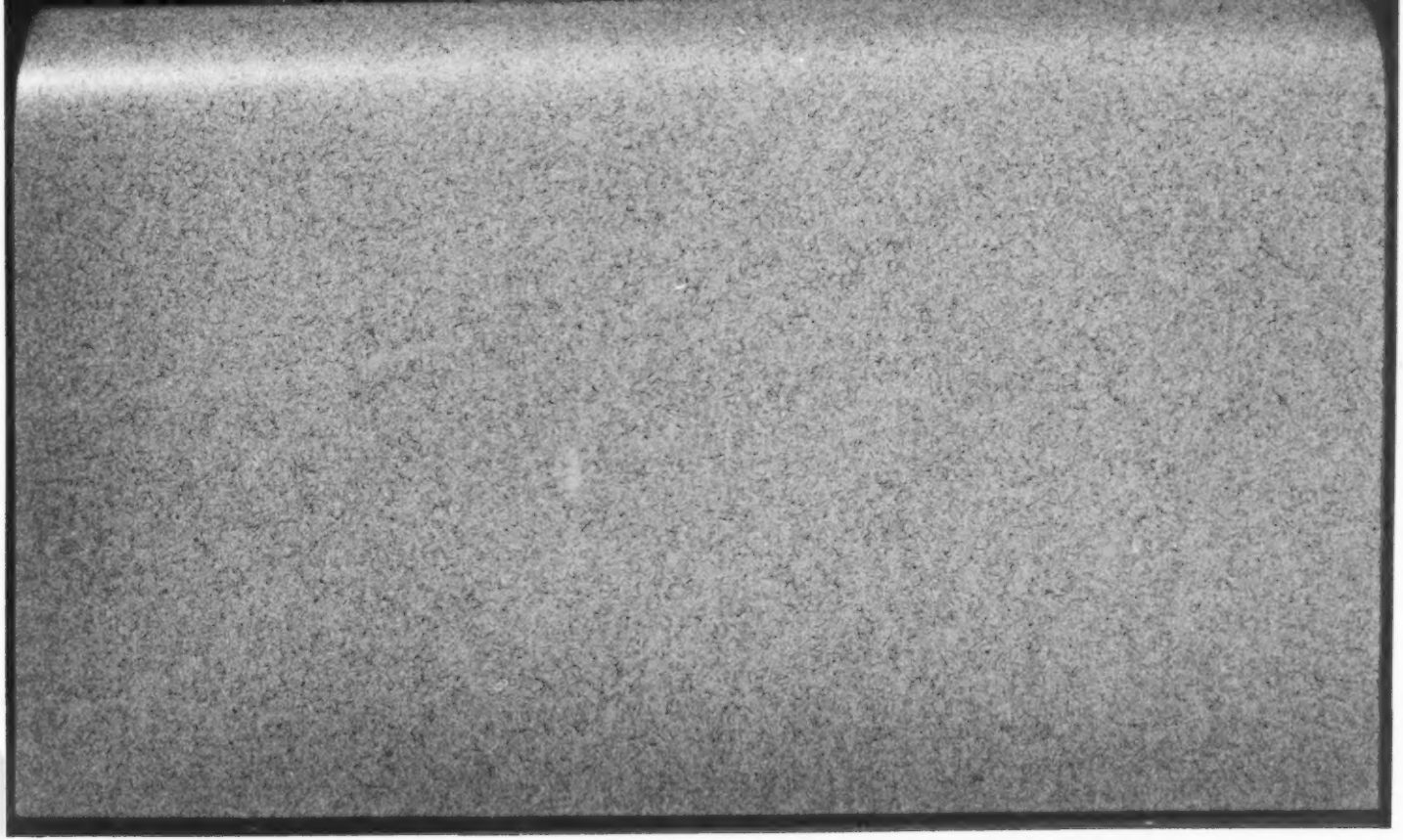
vs.

ANGLO-AMERICAN LAND MORTGAGE AND AGENCY COMPANY (LIMITED,)
RESPONDENT.

BRIEF FOR RESPONDENT.

OMAR POWELL,
GILBERT A. DAVIS,
DANIEL L. CADY,
Counsel for Respondent.

APPEAL PRINTING CO., 14-16 Vesey Street, N. Y.



Supreme Court of the United States

OCTOBER TERM, 1902.

No. 167.

NASHUA SAVINGS BANK,
Petitioner,

vs.

ANGLO-AMERICAN LAND MORTGAGE AND AGENCY COMPANY, Limited,
Respondent.

Brief of Respondent.

Statement.

The Anglo-American Land Mortgage and Agency Company, an English corporation brought action against the Nashua Savings Bank to recover two calls made by its directors against its shareholders on account of moneys unpaid on the par value of their stock.

One call was made in 1894 and the other in 1895. The 1894 call was subsequently paid (p. 9). The action proceeded to trial upon the 1895 call (p. 10) before the Honorable William L. Putnam, Circuit Judge, and a Jury. During the progress of the trial the petitioner saved the following exceptions:

1st. To the admission of the answer of Frederick Herbert Ramsden (p. 12) upon the ground that it did not appear that witness had personal knowledge of the facts answered.

Presented here by the 1st assignment of error (p. 46).

2d. To the admission of the Statutes of Great Britain upon the ground that they were "defectively authenticated" (p. 14).

Presented here by the 2d assignment of error (p. 47).

3d. To the admission of Article 140 of the Company's Articles of Association (p. 23) upon the ground that it made an invalid distinction between resident and foreign stockholders.

Presented here by the 3d assignment of error (p. 49).

4th. To the admission of that part of the Company's Register of Members showing its account with the defendant (pp. 23-24) upon the ground that it was not the whole of the share register.

Presented here by the 4th assignment of error (p. 49).

5th. The petitioner requested the Court to instruct the jury that the action could not be maintained until after the respondent had enforced its lien by sale or forfeiture of the petitioner's shares (p. 34).

Presented here by the 31st assignment of error (p. 57).

6th. At the close of "*all*" (p. 26) the evidence, the petitioner moved that the Court direct a verdict for petitioner, which was refused (p. 27) and a verdict was directed for the respondent (p. 44). To this two other exceptions were taken. One to

the direction of a verdict for the respondent and the other to the refusal to direct a verdict for the petitioner (pp. 26 to 34) upon many grounds which are alleged as separate exceptions in the 5th to the 30th assignments of errors (pp. 50 to 57).

The Court in directing the verdict made "observations" (pp. 34 to 44) *i. e.*, he gave an opinion upon certain of the points of law argued by counsel as applied to all the evidences before him.

Petitioner did not ask to go the jury upon any question of fact, neither did the petitioner move for a new trial, but rested its bill of exceptions upon the requests for rulings and exceptions to admission of evidence.

I.

Ramsden's testimony as to non-payment of calls.

[*First Exception, p. 12.*]

As the respondent, to make a *prima facie* case, was not required to prove non-payment of calls, the testimony was immaterial and if that objection had been made the Court could properly have excluded it.

The witness had testified that he was Secretary of the respondent. The Articles of Association (p. 20, §107) prescribe that the Secretary shall "have charge of the books and accounts of the Company, conduct the correspondence on its behalf, etc." *Prima facie*, he had knowledge of the fact. He was the officer, who above all others, would have knowledge of the facts asked.

There was no claim that the call had been paid. Neither did the petitioner's brief statement of defense (pp. 6-7) plead or present the issue of payment.

II.

The authentication of the statutes of Great Britain.

[*Second Exception, p. 14.*]

Foreign statutory laws may be proved:

> (1) by a duly certified copy; (2) by a sworn, compared, written copy, or (3) by a printed copy produced by a licensed practicing attorney of the foreign country authenticated by his oath as having been officially printed and receivable in evidence in that country without further proof.

In this case the third mode of proof was followed. The petitioner objected because statutes were not authenticated according to the first or second methods. U. S. R. S., §721 by providing that the State laws shall be "rules of decision" makes the New Hampshire law of evidence that of the U. S Circuit Court when sitting in that district.

> McNeil vs. Holbrook, 12 Peters, 84 89.
> Conn. Mut. Life Ins. Co. vs. Union Trust Co., 112 U. S., 250-255.

In New Hampshire the rule is still more liberal than that followed in this case.

In Hall vs. Costello (48 N. H., 176) a New Hampshire attorney went to Canada investigated the law, came home and was allowed to testify orally as to what he found to be the Canadian statute law. If respondent had sent a New Hampshire lawyer to England who, after examining the English statutes, had returned and testified, the evidence would have been admissible in a U. S. Court sitting in New Hampshire. We did much better. We produced an English attorney

of 30 years' experience who was "intimately acquainted with English Company or corporation laws," who produced before the Court copies of the statutes printed by the English Government and used as such in the Courts of that country. We submit that it was the best and most practical mode of proving the foreign law.

See also Kennard vs. Kennard, 63 N. H., 303.
State vs. Davis, 69 N. H., 350.
Barrows vs. Downs & Co., 9 R. I., 446.

In the Pawashick, 19 Fed. Cases (#10851) (2 Low., 142). Judge Lowell held that books of "acknowledged and ascertained authority" were competent proof of English law and that "an oath is not necessary in all cases." He asks; "whether the idle, unnecessary and obsolete mode of verification should be insisted upon?"

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In Merrifield vs. Robbins, 8 Gray, 150, the statutes of Vermont having printed on the title page "By Authority" was held to purport publication by the Government of Vermont and competent.

Counsel does not argue, and it can not be seriously doubted that Ramsden has shown the statutes produced to be the officially printed statutes of England. The statutes produced were verified by the oath of the witness—it was a sworn copy. The

evidence carried on is face, verity and certainty.

There is no reason for a more strict rule. Authentication is a question for the Court. The English law is an open book to judges and lawyers. Our libraries are filled with English textbooks, reports and statutes. The Courts are continually citing them in their opinions. When a judge will take a book from his library shelf, cite it as the law of England and follow it as an authority, why should an attorney do more than present the same book and swear to it as the officially printed laws.

See Church vs. Hubbard, 2 Cranch, 238.
Ennis vs. Smith, 14 How., 426.
Pacific Gas Co. vs. Wheelock, 80 N. Y. 278.
Dundee Mortgage, Trust & Investment Co. vs. Cooper, 26 Fed. Rep., 665.

III.

Does §140 of the articles of association create an unlawful distinction?

[*Third Exception, p. 23.*]

This section provides that if a non-resident stockholder shall "neglect to give his address" the office of the company shall be deemed his address (See p. 22, par. 139).

This is a very reasonable requirement. No wrong is done. Its only application to this case was that the evidence *not included in the record* showed that the petitioner had neglected to give its address and that the notice of call was posted in the office of the company. The evidence however, went further and showed that a notice of call was mailed to and received by the petitioner (p. 36). So, even if this paragraph was invalid, the petitioner

had due notice and actual knowledge of the call. By becoming a stockholder, the petitioner subjected himself to the laws of England governing the respondent Company and all reasonable rules of the Company.

Canada Southern R. R. Co. vs. Gebhard, 109 U. S., 527.

Hudson River Pulp and Paper Co. vs. H. H. Warner, 99 Fed. Rep., 187.

Mandel vs. Swan Land & Cattle Co., 154 Ill. 177. s. c. 27 L. R. A., 313.

IV.

The admission in evidence of the defendant's stock account.

[*Fourth Exception, pp. 23-24.*]

The petitioner's objection was sufficiently answered by the Trial Judge (p. 24). The record expressly states that "no objection is made as to the same not being a copy * * * of defendant's account" (p. 23).

The rule is too familiar to need argument or authority that a litigant has the right to introduce competent evidence without regard as to whether it is all the evidence upon the subject. That the evidence produced does not cover the whole issue may raise the question of sufficiency, but it does not affect its competency.

V.

A sale or forfeiture of the petitioner's shares was not a condition precedent to the responde nt's right to recover calls (Fifth Exception, p. 34).

Measuring the petitioner's liability by the English statutes and the Company's Articles of Association framed thereunder, a forfeiture of the petitioner's shares would not relieve it from liability for the calls (p. 25, §19).

Mandel vs. Swan Land Co. (154 Ill., 177), is in point. The Court there held that notwithstanding forfeiture, a stockholder in an English corporation would be held liable for calls by the Courts in this country.

Forfeiture puts an end to the relation of corporation and stockholder and in many jurisdictions might bar the right to recover for unpaid calls. (7 Thomp. Corp., §8680). The right of forfeiture and the right of action against the shareholder for unpaid calls is usually expressed as a cumulative remedy (Thomp. Corp., §8679). Neither can petitioner question the advisability or necessity of the call.

The Articles of Association provide (p. 20, par. 9) that the directors may "make such calls as they think fit, etc." and the statutes (p. 15, par. 16) enact that the shareholder shall be bound according to the Articles of Association, and that "all moneys payable by any member to the Company in pursuance of the conditions and regulations shall be deemed a debt due from such member to the Company."

This power delegated to the directors cannot be questioned or denied by the Courts except for fraud or oppression.

In the absence of fraud, a stockholder can not question the wisdom or necessity of a call.

Oglesby vs. Attrill, 105 U. S., 605-610.

A stockholder cannot question the necessity or advisability of a call (Cook on Stockholders, §111-113), and a call made by directors is conclusive evidence of its necessity, and binds the stockholder without notice.

Great Western Telegraph Co. vs. Purdy, 162 U. S., 339.

Bailey vs. Birkenhead 12 Beav., 443.

Angio American &c. Co. vs. Dyer, —Mass.—s. c. 64 N. E. Rep. 416, 2 Thomp. Corp., §1710.

VI.

Errors predicated on the direction of a verdict.

[*Sixth Exception, pp. 26-44.*]

Assignments 5th to 30th are but different reasons or grounds for the argument that the Court erred in directing a verdict for the respondent (p. 44) and in refusing to direct a verdict for the petitioner (p. 26).

Whether the Court erred in directing a verdict requires a consideration of the evidence as a whole. This question is not before the Court as all of the evidence was not included in the bill of exceptions nor does it purport to contain all of the evidence.

> Texas & Pacific R. R. vs. Coxe, 145 U. S., 593-606.
>
> Hansen vs. Boyd, 161 U. S., 397.
>
> City of Providence vs. Babcock, 70 U. S., 240-244.
>
> U. S. Mutual Accident Assn. vs. Robinson (C. C. A. 8th Circuit), 74 Fed. Rep., 10.

Every presumption is in favor of the correctness of the decision of the Trial Court and in order to review rulings *based upon all the evidence*, there must be a statement or certificate that all the evidence is included in the bill of exceptions.

> U. S. vs. Patrick (C. C. A., 8th Circuit) 73 Fed. Rep., 800-806.

The bill of exceptions affirmatively shows that it does not contain all the evidence. The opinion of the Trial Judge was made a part of the bill of exceptions (p. 34). And can be looked to in

determining this question. For illustration: none of the evidence as to the *time*, *amount* or *manner* of making the call or of giving notice thereof is included, yet the opinion shows that there was such evidence. In his opinion the Trial Judge said (p. 35):

> "Then there is no doubt that the call for "this assessment has been properly proven. "The only possible question that could have "arisen was whether or not certain persons "were directors of the corporation at the "time of the call. As to that, no issue has "been made."

Again on page 36 he said:

> "Then as to notice of the call. It is plain "from the testimony that the notice was "posted, etc. It is plain from the testimony "of Ramsden, and of the Treasurer of the "defendant corporation that the notice was "mailed to the defendant corporation and "received by it."

As the petitioner has left out nearly all of the evidence and has made the opinion of the Trial Judge a part of his bill of exceptations (see p. 34) he has adopted the statements of the Trial Court as to the sufficiency of the evidence.

> Pennsylvania Co. vs. Swan, 37, Ill. App., at p. 85.

By making the opinion a part of the bill of exceptions the petitioner has bound itself by every statement and conclusion of fact therein. Even the authorities cited in the opinion must be presumed to have been *applicable* to the facts before the Trial Court. In other words, this Court will presume that the authorities cited were applicable to the facts and that the Trial Court correctly stated the *law of this case*. Hence the

respondent's right to recover is plain. By moving that a verdict be directed petitioner admitted the truth of respondent's testimony and every conclusion to be fairly drawn therefrom.

Pleasants vs. Fant, 22 Wall., 116.

Another reason why the direction of a verdict cannot be reviewed is that as the petitioner moved for a direction in its favor and the respondent at the same time moved for a direction in its favor, and as neither party asked to go to the jury upon any question, all questions of fact were left to the Court with the same effect as though the case had been tried by the Court without a jury. The direction of a verdict was a general finding for the respondent which cannot be reviewed here. The motions clothed the Trial Court with the functions of a jury.

Thompson vs. Simpson, 128 N. Y., 270.
Westervelt vs. Phleps, 171 N. Y., 212.
See Signa Iron Co. vs. Greene, 88 Fed. Rep., 207.

Again, as no motion for a new trial was made the sufficiency of the evidence can not be reviewed on a writ of error.

City vs. Babcock, 3 Wall., 240.
See also Mulhall vs. Keenan, 18 Wall., 342.

The petitioner's promise to pay. In the Court below, petitioner strongly insisted that there was no promise, express or implied, to pay calls.

Respondent insisted then, as we do here, that as the record does not contain all the evidence, the question of whether there was an express promise or a statutory liability amounting to an implied promise, can not be considered.

Still, upon the record, fragmentary as it is, a promise is shown.

The share certificate produced by petitioner (p. 22), contained the provision "subject to the Articles of Association and the rules and regulations of the Company. and that up to this day there has been paid in respect to each of such shares, the sum of One pound.

The Articles of Association (p. 20, par. 9) empower the directors to make calls upon the members for the unpaid moneys due upon their shares.

The statutes of Great Britain under which this Company was organized provided (p. 15. par. 16) that the Articles of Association shall bind the members the same as though subscribed by them and that there was therein a covenant upon the part of the shareholder to conform to the regulations contained in the Articles and "all moneys payable by any member to the Company in pursuance to the conditions and regulations should be deemed a debt due from such member to the Company."

The accepting and holding of the shares by petitioner upon these conditions created an implied if not an express promise to pay the balance when called.

The record contained this statement (p. 22):

> "No promise, express or implied, to pay such "assessments was proven other than that "arising from the acceptance and retention of "the certificate of stock by defendant a "from the Articles of Association and rules "and regulations referred to in said Certifi- "cate of stock and the statute of Great "Britain."

This statement does not show that the record contains all the proofs of a promise. In fact it does not refer to any of these facts as being in the

record. While there was evidence upon this question not included in the record, we submit that enough evidence is included to show that the defendant impliedly, if not expressly, promised to pay calls.

The Trial Court held that the evidence *before him* was sufficent (p. 35).

In Tucker vs. Haughton, 63 Mass., 350-354, the Court said:

> "No particular form of words is necessary "to constitute a promise. If the papers show "that the writer has taken upon himself the "duty of paying, it amounts to a promise."

In Buffalo & N. Y. R. R. Co. vs. Dudley (14 N. Y.), Judge Seldon, on page 351 said:

> "On the contrary, as I understand the dis- "tinction between express and implied prom- "ises, that existing in this case belongs to the "former class. An express promise is one "which is expressed in words. No particular "form of words is essential to such a prom- "ise; but if the language used, when fairly "interpreted, imports an undertaking to "pay, this, I apprehend, constitutes "an express promise. The letters 'I. "O. U.' which have been held to "amount to a promissory note, constitute an "express promise no less than if the words "'I promise to pay' had been used. An im- "plied promise, on the other hand, is one "which is not deduced from the language of "the party, but which the law raises upon "principles of equity and justice, in view of "some consideration received. In this case, "a promise to pay is necessarily embraced in "the agreement to take stock, subject to lia- "bilities of the charter. As there was no way "in which the defendant could take stock "agreeably to the charter without paying for "it, an agreement to take, of course, included

"a promise to pay, and this, I apprehend, "must be considered an express promise."

In Howarth vs. Lombard (175 Mass.) p. 574, the Court said:

"The undertaking is as if one subscribing "for stock expressly agreed to take and hold "it under a previously prepared contract in "writing that all who should become holders "of the stock should pay the amount of their "subscription to the corporation when needed, "etc."

In Webster vs. Upton, 91 U. S., 67, the Court said:

" * * * and if its intent was that "the whole capital might be called in, it is "difficult to see why a subscriber, knowing "that intent and voluntarily becoming a sub-"scriber, does not impliedly engage to pay in "full for shares when payment is required."

In Upton vs. Tribilcock, 91 U. S., 45-48, the Court said:

"The acceptance and holding of a certificate "of shares in a corporation makes the holder "liable to the responsibility of a shareholder. " * * * a promise to take shares of "stock imports a promise to pay for them, "(Palmer vs. Lawrence, 3 Sandf. Sup. Ct., "N. Y., p. 9) the acceptance and holding of a "certificate has the same effect."

Whether the liability of the petitioner be defined as an express promise or as an implied promise, is immaterial.

This very question was before the Supreme Court of Massachusetts, in the case of this respondent vs. Dyer—Mass.—s. c., 64 N. E. Rep., 416.

Proof of respondent's incorporation. While, the record does not present this question, still as the

dissenting opinion in the Court below places stress upon the point, we say: Under the English law the "Memorandum of Association" corresponds to the Charter or Certificate of Incorporation in this country and the "Articles of Association" correspond to and are in this country, called "By-Laws."

The respondent's Memorandum of Association was read in evidence in full (p. 17) as was also the Certificate of Incorporation by the Registrar appended thereto (p. 19). No objection was made to either of these.

The witness Ramsden, also testified without objection:

> "The plaintiff Company was organized or "incorporated on 31st October, 1882." (p. 23)

The opinion of the Trial Judge, which is made a part of the bill of exceptions, was that the respondent's incorporation had been sufficiently proved. He said (p. 35):

> "However, it is not necessary to pass upon "that question because I am sure that the "plaintiff has proved the issue in its evidence "so clearly that I would not be authorized to "submit it to the jury."

Notwithstanding the absence of any exception sufficient to raise this question, the Judge in the dissenting opinion insisted that the evidence did not show that respondent was a going concern. No issue was raised by the pleadings beyond the fact of the respondent's incorporation. In other words, that the petitioner by denying (p. 6) that the "plaintiff corporation was ever duly organized" does not raise any issue as to whether the respondent is a going concern. If the dire and dreadful possibilities suggested in the dissenting opinion (p. 66) be true, the petitioner could easily

have shown it. Petitioner has been a shareholder since 1883 (p. 22) and in the fifteen years before the trial had ample opportunity to discover whether there was anything wrong in the respondent's incorporation, or whether it is an active going corporate institution.

Petitioner would certainly have raised the question in the Trial Court if there was any truth in the suggestions of the dissenting opinion below.

A plaintiff need not in proving his *prima facie* case anticipate matters of affirmative defense.

Presumption of Regularity.

If we understand the dissenting opinion in the Court below, it is that the respondent being an alien corporation, there can be no presumption that its officers have acted in a regular or lawful way; that their acts proved in the same way and to the same extent as would be sufficient to prove the acts of officers of a corporation of one of the United States, was not sufficient in this case. No such question was raised in the Trial Court (pp. 35-40) and while the record contains no substantial part of the evidence upon this subject and the question is academic here still we submit that in the absence of evidence to the contrary, the acts of a foreign corporation are presumed to be valid and authorized by the State of its incorporation, 6 Thomp. Corp , §7883.

The rule of the binding obligation of foreign statutes is of no less force because the Courts placed the enforcement upon grounds of comity.

Comity is not a cloudy rule founded upon the courtesy of the Court. It is the common law of this country which the Courts must enforce. As stated by Chief Justice Taney in Bank of Augusta v. Earle (13 Pet. at page 589 where he approvingly quotes Story, Conflict of Laws, §38):

"It is not the comity of the Courts, but the comity of the nation, which is administered and ascertained in the same way and guided by the same reasoning by which all other principles of the municipal law are ascertained and guided."

A corporation organized under a foreign government stands in this respect upon the same footing as corporations of other states.

The British American Land Co. v. Ames
6 Met , 391.
Story, conflict of Laws, §§5-65.
2 Morawetz Corp., §§ 960-961.

These statutes are that which constitutes the respondent corporation. They are as much a part of the petitioner's contract and of his rights as are the different members of the human body a part of that body and necessary to its completeness. It is these statutes which enabled the many persons associated in the respondent company as stockholders to hold themselves out as a single entity, separate and apart from them as individuals. We cannot take away these corporation statutes and their binding obligation upon the stockholders without destroying the corporation.

Petitioners share certificate expressly bound him to an English contract.

See Milliken v. Pratt, 125 Mass., 374.

The acts of this company in the management of its internal affairs must have that presumption of validity that will be accorded to the acts of individuals or to state it more correctly the burden was upon petitioner to show irregularity or invalidity. This presumption falls within that numerous class of presumptions such as presumption of adult age; presumption of sanity; presumption of good character, etc., etc.

These presumptions are accorded to alien individuals the same as to citizens. Of course, these presumptions would not relieve from proof of corporate existence, of laws authorizing the directors to make calls, of the making of calls in the manner prescribed by the statutes and the rules of the company and the contract that the defendant pay calls, but when these proofs are shown a case is made out. In short, it requires no greater *quantum* of proof to make a case for an English corporation than it would for a corporation of any one of the United States.

This Court in Canadian Southern Ry. vs. Gebhard, 109 U. S., 527, at page 537 said:

> "Whatever disabilities are placed upon the "corporation at home, it retains abroad and "whatever legislative control it is subject to "at home, must be recognized and submitted "to by those who deal with it elsewhere. A "corporation of one country may be excluded "from doing business in another country "(Paul vs. Virginia, 8 Wall., 168), but if ad- "mitted it must in the absence of legisla- "tion equivalent to making it a corporation of "the latter country, be taken, both by the "country and those who deal with it, as a "creature of the law of its own country, and "subject to all the legislative control and di- "rection that may be properly exercised over "it at the place of its creation."

Again on page 539 the Court said:

> "Under the circumstances, the true spirit "of international comity requires that schemes "of this character legalized at home should be "recognized in other countries."

If, as in the Gebhard case, a domestic creditor's debt can be wiped out, by a foreign law, it is much easier to see in the case at bar that the

petitioner is liable to perform his fair and reasonable contract with a foreign corporation.

Sufficiency of the Declaration.

The only place where this question was mooted was when the Court was asked to direct a verdict for petitioner (p. 26) and among the many reasons assigned was that the declaration did not contain averments which it was claimed it should.

The verdict is the conclusion of the Court based upon the *facts* in evidence and as stated in another part of this brief, it can only be reviewed by consideration of *all* the evidence.

It is not claimed that the declaration does not state facts sufficient to constitute a cause of action. The most that can be said is that it should have contained allegations of certain facts in order to make the evidence of those facts admissible. That question can only be raised by an objection to the evidence when offered upon the ground that it was irrelevant and not within the issue joined by the pleadings. No such objection was made.

If it be claimed that there is a variance between the declaration and the proofs we answer: (1) that can only be decided by an examination of all the evidence which is not before the Court and (2) that to save the right of objection upon the ground of variance the party must object to the admission of the evidence when it is offered and if he does not do so it is waived.

Roberts vs. Graham, 6 Wall., 578.
Boston & Albany R. R. Co. vs. O'Reilly 158 U. S., 334.
Graves vs. State, 121 Ind , 359.
Dunstan vs. R. R. Kirkland, 3 Hughes 641 s. c. Fed. Cas., 4181.

If the objection be not taken when the evidence is offered, the Court may instruct the jury upon the whole field of inquiry covered by the evidence.

Boyce vs. California Stage Co., 25 Cal., 460.

If objection had been made to the evidence when offered the Trial Court would have passed upon that question and would properly have allowed an amendment if it had found that there was a variance.

In any event it is not a ground for reversal. U. S. R. S., §954, provides that "no writ" * * * declaration * * * judgment * * * shall be * * * reversed for any defect or want of form, but such Court shall proceed to give judgment according as the right of the cause and matter in law shall appear to it, etc."

As the common-law rules of pleadings prevail in New Hampshire it is submitted that the *debitatus assumpsit* is the proper form of action.

See. 1 Chitty on Pleadings (13 Amer. Ed.) *340 *341 *401 *106.

In 2 Chitty pleadings, * 52, will be found a precedent for the declaration in this case. There is also a precedent of this form of declaration in Davis, Treasurer vs. Williams, Administrator, 3 East., 232.

See also Pullman vs. Upton, 96 U. S., 328.
Mandell vs. Swan Land Co., 154 Ill., 177.

If there had been a mistake in the form of action it was only a ground for *non-suit* which was not asked. It is not a ground for the direction of a verdict.

1 Chitty on Pleadings, 197 *198.

In Dermott vs. Jones, 2 Wall, 1—9, this Court said:

> "While a special contract remains executory, the plaintiff must sue upon it. When it has been fully executed according to its terms and nothing remains to be done but the payment of the price, he may sue upon the contract or *indebitatus assumpsit* and rely upon the common counts. In either case the contract will determine the rights of the parties."

While the question was not properly raised the Trial Court (pp. 41-43) and the Court of Appeals (pp. 62) passed upon the form of the declaration and approved it.

Respectfully submitted,

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19370

Supreme Court of the United States.

No. 167.—October Term, 1902.

The Nashua Savings Bank, Petitioner, vs. The Anglo-American Land, Mortgage and Agency Company.	On writ of certiorari to the United States Circuit Court of Appeals for the First Circuit.

[March 16, 1903.]

This was an action by the defendant in error, a British corporation, in the Circuit Court for the District of New Hampshire, against the Nashua Savings Bank, a New Hampshire corporation, to recover an assessment made by such corporation in pursuance of its charter and by-laws, upon defendant's subscription to a thousand shares of its stock.

The case was tried before the Circuit Judge and a jury, and resulted in a verdict for the plaintiff by direction of the court, and a judgment against the bank in the sum of $7,131.10, which was affirmed on writ of error by the Circuit Court of Appeals. (108 Fed. Rep. 764.)

Mr. Justice Brown delivered the opinion of the Court.

The assessment in question had been made by the directors of the company, in pursuance of their amended articles of association, which declared that "the directors may, from time to time, make such calls as they think fit upon the members in respect of all moneys unpaid on their shares, and each member shall pay the amount of every call so made upon him to the persons, and at the times and places appointed by the directors."

1. In order to prove the incorporation of the plaintiff company, as well as the liability and rights of the stockholders, the deposition of an attorney and solicitor of the Supreme Court of Judicature in England, who was also managing director of the plaintiff company, was read in evidence. His testimony showed that the plaintiff was a corporation organized with limited liability under five different acts of Parliament, from 1862 to 1880, copies of which he produced and delivered to the commissioner, stating that these copies were "issued by authority, being printed by Her Majesty's printer, and are as such by law receivable in evidence without further proof." To the admission of the statutes the defendant excepted upon the ground that they were not proved according to the established rules of law.

As these statutes were the basis of the plaintiff's corporate existence, and its right to bring this action, they must undoubtedly be proved as facts,

(*Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 445.) While it was stated by this court in the early case of *Church* v. *Hubbart*, (2 Cranch, 187, 238,) that foreign judgments are usually and most properly authenticated either by an exemplification under the great seal, by a copy proved to be a true copy, or by the certificate of an officer authorized by law, which certificate must itself be properly authenticated, the Circuit Court of the United States sitting in New Hampshire may, under R. S. sec. 721, declaring that "the laws of the several States," with certain exceptions, "shall be regarded as rules of decisions in trials at common law in the courts of the United States," receive such evidence of the authentication of foreign statutes as the practice of the courts in that State may authorize and justify, (*McNeil* v. *Holbrook*, 12 Pet. 84, 89; *Conn. Life Ins. Co.* v. *Union Trust Co.*, 112 U. S. 250, 255; *Vance* v. *Campbell*, 1 Black, 427.) The "laws of the several States" with respect to evidence within the meaning of this section apply not only to the statutes but to the decisions of their highest courts. (*Bucher* v. *Cheshire Railroad Co.*, 125 U. S. 555, 582; *Ex parte Fisk*, 113 U. S. 713, 720; *Ryan* v. *Bindley*, 1 Wall. 66.)

The law of New Hampshire upon this subject appears to have been settled in *Hall* v. *Costello*, (48 N. H. 176,) in which an attorney, resident in New Hampshire, who had gone to Canada to investigate Canadian law, was permitted to state orally what he found the law to be, as embodied in the Queen's proclamation of neutrality. To same effect are *Barrows* v. *Downs*, (9 R. I. 446;) *Jones* v. *Maffett*, (5 S. & R. 523.) There is an even greater reason for permitting a local attorney, of thirty years' experience, who, as he states, was intimately acquainted with the English company or corporation laws, to produce as evidence of such laws copies of the statutes printed by authority of the English government, and used as proofs of statutes in the English courts.

It would appear that such authentication of foreign laws would be deemed sufficient in the English courts, as in *Lacon* v. *Higgins*, (3 Starkie, 178,) it was held that the French code was sufficiently proved by a witness—a French vice consul—who produced a book printed by authority of the French government, which the witness stated contained the French code, upon which he acted in his office as vice consul. In most, if not all, of the States of this Union statutes have been passed permitting laws of sister States to be proved simply by the production of a book containing what purports to be an authorized edition of such laws printed by State authority. (*Emery* v. *Berry*, 28 N. H. 473.) While the same liberality is not extended to foreign laws required to be proved as facts, it would seem like sticking in the bark to hold that a foreign expert might testify orally as to what such laws were, and not be able to produce what purports to be the official edition of such laws, and to testify as to the authenticity of such edition, and to the fact that it was received as evidence in

the domestic courts of that country. To the average mind it would seem as though there was much less liability to mistake in a printed copy of a statute from the official printer, than in a copy written and compared by an ordinary scrivener. The evidence was properly received.

2. Exception was also taken to the declaration, in that it contained no averment or allegation upon what conditions the plaintiff was authorized to make assessments. In this connection it is insisted that the declaration should have averred that such an assessment was necessary to pay the debts of the plaintiff, or was made for the benefit of its creditors; that it is also defective in that it contains no averment of notice of such assessment to defendant; or that defendant ever made an express promise to pay such assessment; and no direct allegation that defendant was a stockholder at the time the assessment was made. It appears, however, by the act of 25 and 26 Vic. chap. 89, "for the incorporation, regulation and winding up of trading companies and other associations," that the articles of association, "when registered, shall bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in such articles contained a covenant on the part of himself, his heirs, executors and administrators, to conform to all the regulations contained in such articles, subject to the provisions of this act; and all moneys payable by any member of the company, in pursuance of the conditions and regulations, *shall be deemed a debt* due by such member to the company, and in England and Ireland in the nature of a specialty debt." It also appeared by the articles of association of the plaintiff corporation, No. 3, "that every person who has accepted any share or shares in this company, and whose name is entered in the registry of members, and no other person, shall be deemed to be a member." These regulations also contained the provision heretofore mentioned, that the directors might from time to time make such calls as they think fit upon the members in respect of all moneys unpaid on their shares. The board of directors is thus constituted a tribunal to determine when and to what amount assessments shall be made upon the unpaid shares of stock. By subscribing to stock in a foreign corporation, defendant subjected itself to the laws of such foreign country in respect to the powers and obligations of such corporation. (*Canada Southern R. Co.* v. *Gebhard*, 109 U. S. 527; *Relfe* v. *Rundle*, 103 U. S. 222.)

In the absence of fraud the necessity for an assessment upon the capital stock cannot be made the subject of inquiry by the courts. As was said by Mr. Justice Field in *Oglesby* v. *Attrill*, (105 U. S. 605, 609): "As to the wisdom of an assessment, or its necessity at the time, or the motives which prompt it, the courts will not inquire, if it be within the legitimate authority of the directors to levy it, and the objects for which the company was incorporated, would justify the expenditure of the money to be raised.

They will not examine into the affairs of a corporation to determine the expediency of its action, or the motives for it, when the action itself is lawful." (*Bailey* v. *Birkenhead &c. Railway Co.*, 12 Beav. 433; see also Cook on Stockholders, sec. 113; *Great Western Telegraph Co.* v. *Purdy*, 162 U. S. 329.) Whether such assessment could be impeached by showing that the corporation was not a *bona fide* enterprise, or had never actually engaged in business, or become a going concern, or that the assessment was made unnecessarily and in bad faith, or that a discrimination was made against foreign stockholders, it is unnecessary to determine, since no evidence to that effect was offered on behalf of the defendant. Certainly, under the cases above cited, it would be unnecessary in order to make a *prima facie* case to negative these facts. There is a presumption of good faith attaching as well to foreign as to domestic corporations.

The trial proceeded under the third count of the declaration, which was in *indebitatus assumpsit*, and no objection was made to the evidence offered upon the ground of variance. Under such circumstances, and without expressing an opinion as to the admissibility of the evidence offered, the declaration is good after verdict. In *Roberts* v. *Graham*, (6 Wall. 578,) we held that variances between the allegation and proof must be taken when the evidence is offered, and if such evidence be sufficient to support the verdict the defect in the declaration is cured. (*Patrick* v. *Graham*, 158 U. S. 33.)

The court in charging the jury in this case instructed them that there was no doubt the call for this assessment had been properly proved; that the only possible question which could have arisen was whether or not certain persons were directors of the corporation at the time of the call, and that as the amended articles of the association provided that calls might be made by the directors, there was no doubt that the call in question was properly made.

As the bill of exceptions contains nothing to indicate that the call was not properly made, and does not show that it contained *all* the evidence in the case, we should be at liberty, if the circumstances of the case required it, to infer that there was other evidence to supply any defect in respect to the legality of the call. (*Hansen* v. *Boyd*, 161 U. S. 397; *City* v. *Babcock*, 3 Wall. 240; *United States* v. *Patrick*, 73 Fed. Rep. 800.) The sufficiency of the evidence cannot be reviewed on writ of error. (*Generes* v. *Campbell*, 11 Wall. 193, 199; *Dower* v. *Richards*, 151 U. S. 658.)

It appears from the testimony of the secretary of the company that a notice of the call was posted up in a conspicuous place in the register's office of the company for more than a month before the call was payable, and in addition thereto a printed notice of the call was also forwarded to the defendant bank. This was a sufficient compliance with article 140 of the articles of association, which provides that "if any member resident out of

the United Kingdom neglect to give such address as is herebefore required, notice from him may be posted up in a conspicuous place in the register's office of the company, and for all the purposes of these regulations the register's office of the company shall be deemed to be the registered place of abode of such member."

3. A sale or forfeiture of defendant's shares was not a condition precedent to the right to recover this assessment. While a remedy by forfeiture is given by the articles of the association, this remedy is cumulative, and is no bar to an action at law for the debt. This is clearly intended as a concurrent remedy.

4. Nor do we think there was any necessity of proving an express promise to pay this assessment. The English statute above quoted provides that all moneys payable by any member in pursuance of the articles of the company shall be deemed a *debt due by such member* of the company, and as this statute implies a promise to pay from a subscription to the shares, it clearly obviates the necessity of proving an express promise. (*Upton* v. *Tribilcock*, 91 U. S. 65; *Webster* v. *Upton*, 91 U. S. 65; *Chubb* v. *Upton*, 95 U. S. 665; *Howarth* v. *Lombard*, 175 Mass. 574.) Although the law of New Hampshire seems to be that in the absence of an express promise no personal action will lie, (*Shattuck* v. *Robbins*, 68 N. H. 585,) yet even there an obligation created by the charter is treated as the equivalent of an express promise. (Cook on Stockholders, sec. 71; *Anglo-American Co.* v. *Dyer*, 181 Mass. 593.)

There was no error in the action of the court below, and its judgment is therefore

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.